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Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 95-32

In the Matter of

Amendment of Section 73.202(b), RM-8545
Table of Allotments,
FM Broadcast Stations.
(Parker and Port St. Joe, Florida)

NOTICE OF PROPOSED RULE MAKING

Adopted: March 20, 1995; Released: March 20, 1995

By the Chief, Allocations Branch:

Comment Date: May 11, 1995
Reply Comment Date: May 26, 1995

1. Before the Commission for consideration is a petition for rule making filed by Southern Broadcasting Companies, Inc. ("petitioner"), licensee of Station WPBH(FM), Channel 233C, Port St. Joe, Florida, requesting the reallotment of its channel to Parker, Florida, and the modification of its license accordingly.

2. Petitioner seeks to invoke the provisions of Section 1.420(i) of the Commission's Rules, which permit the modification of a station's license to specify a new community of licensee without affording other interested parties an opportunity to file competing expressions of interest. *See Modification of FM License ("Change of Community R&O")*, 4 FCC Rcd 4870 (1989), *recon. granted in part ("Change of Community MO&O")*, 5 FCC Rcd 7094 (1990). In this regard, petitioner advises that the requested reallotment to Parker is mutually exclusive with the present allotment of Channel 233C at Port St. Joe, since no change in transmitter site is contemplated. Petitioner advises that, operating with existing facilities from its present site, Station WPBH(FM) would be able to provide city grade coverage, a 70 dBu signal over the entire community of Parker. Petitioner also states that Port St. Joe (population 4,044)[1] will continue to receive city grade service from Station WPBH(FM), as well as local aural transmission service from Station WMTO(FM). Therefore, Port St. Joe will not be deprived of its sole local aural transmission service. Petitioner contends that Parker (population 4,598) is not located within the Panama City Urbanized Area.

3. In support of its proposal, petitioner states that Parker is an incorporated community, with its own fire chief, police, parks, and street departments. Parker also has its own library and numerous businesses, churches and civic organization.

4. Based on the information before us, we are unable to determine whether petitioner's proposal would result in a preferential arrangement of allotments. However, we believe the proposal warrants consideration since, it would not deprive Port St. Joe of its only local aural transmission service, and its use is mutually exclusive with Parker. We also note that, according to the 1990 U.S. Census, Parker is located within the Urbanized Area of Panama City, Florida. We question whether Parker is deserving of a local service preference, or whether Parker should be credited with all of the aural services licensed to the Panama City Urbanized Area. *See RKO General (KFRC)*, 5 FCC Rcd 3222 (1990) and *Faye and Richard Tuck*, 3 FCC Rcd 5374 (1988). Petitioner is also requested to submit additional information regarding the public interest benefits that would accrue from the reallotment of Channel 233C to Parker, Florida, since it proposes no change in its transmitter site.

5. We believe petitioner's proposal warrants consideration. Channel 233C at Port St. Joe could be reallotted to Parker, Florida, since it would provide the community of Parker with its first local aural transmission service. A staff engineering analysis has determined that Channel 233C can be allotted to Parker, Florida, in compliance with the Commission's minimum distance separation requirements with a site restriction of 47.9 Kilometers (29.8 miles) southeast at its presently licensed transmitter site.[2] In accordance with Section 1.420(i) of the Commission's Rules, we will not accept competing expressions of interest in the use of Channel 233C at Parker.

6. The Commission believes it would be in the public interest to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following communities:

	Channel No.	
City	Present	Proposed
Parker, Florida		233C
Port St. Joe, Florida	228C2, 233C	228C2

7. The Commission's authority to institute rule making proceedings,showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

8. Interested parties may file comments on or before **May 11, 1995**, and reply comments on or before **May 26, 1995**, and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

[1] Population figures are taken from the 1990 U.S. Census.
[2] The Coordinates for Channel 233C at Parker, Florida are North Latitude 29-49-09 and West Longitude 85-15-34.

Gary S. Smithwick
Shaun A. Maher
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Washington, D.C. 20036
(Attorneys for Petitioner)

9. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

10. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 418-2180. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1),303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
February 27, 1995

Released: March 20, 1995

Lee W. Shubert, Esq.
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In reply refer to:
1800B3-BCD

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Washington, D.C. 20036

Re: WIIZ(FM), Battle Ground, IN
File No. BALH-940516GI
Application for Assignment of Station License

Dear Counsel:

We have on file the above-captioned application to assign station WIIZ(FM), Battle Ground, Indiana, from Wizard Broadcasting, Inc. ("Wizard") to Schurz Communications, Inc. ("Schurz").[1] Also on file are University Broadcasting Company, L.P. ("University") and KGB Broadcasting's ("KGB") (collectively, "Petitioners") timely filed Joint Petition to Deny and various opposition and reply pleadings.[2] Also on file is a July 26, 1994 letter filed by Bruce A. Patrick ("Patrick") objecting to the application.[3] As set forth below, we deny both Petitioners' Joint Petition to Deny and Patrick's objection, and grant the subject application.

Background. Schurz reports that its wholly-owned subsidiary, WASK, Inc., is the licensee of WKOA(FM) (previously WASK-FM) and WASK(AM). Because these stations have principal community contours which overlap with the proposed acquisition, WIIZ(FM), Schurz provides a list of the 11 other commercial radio stations that have principal community contours which overlap with the three subject stations.[4] Accordingly, Schurz concludes that the subject stations are located in a market with 14 or fewer stations, and asserts that its ownership of a third station in the market conforms with 47 C.F.R. § 73.3555(a)(1).[5]

Petitioners allege that the proposed assignment is *prima facie* inconsistent with 47 C.F.R. § 73.3555. Specifically, Petitioners contend that Schurz fails to include two additional stations, WBAA-FM, Lafayette, IN, and WMRS(FM), Monticello, IN, whose principal community contours overlap with the subject stations. Petitioners contend that even though WBAA-FM is a noncommercial station, it should be included in the relevant market because it operates on an unreserved frequency and can be converted into a commercial station or sold to a commercial entity at any time. As for WMRS(FM), Petitioners assert that it should be included in the relevant market because, based on field strength tests of the actual 70 dBu contours, as well as the predicted contours, WMRS(FM) and WKOA(FM)'s contours are subject to overlap. Petitioners further allege that if WKOA(FM) were to increase the height of its tower to the maximum height permitted for a Class B facility, the relevant market would increase to "at least" 18 stations.

Petitioners argue that the inclusion of WBAA-FM and WMRS(FM) creates a market of 15 or more stations. Based upon the relevant audience share from the 1993 Fall Arbitron Market report, Petitioners allege that the proposed combination's audience share would total 32.4 percent. Petitioners argue that the subject application therefore violates 47 C.F.R. § 73.3555.[6]

Patrick contends that grant of the subject application would allow Schurz to "monopolize the Lafayette radio market." Specifically, Patrick alleges that, according to Arbitron data published in a local newspaper, WASK(AM), WKOA(FM) and WIIZ(FM)'s combined audience shares total 32.4%. Given this audience share, Patrick states that a grant of the subject assignment would not be in the public interest, or in the interest of the Lafayette radio market.

Schurz responds that Petitioners are incorrect with respect to WBAA-FM, WMRS(FM) and WKOA(FM).[7] Schurz argues that WBAA-FM should not be included when calculating the relevant market because it is licensed as a noncommercial educational station, and that the "Commis-

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[1] WIIZ (FM) is a Class A station authorized to operate on Channel 254 with 4.4 kW effective radiated power ("ERP") at 119 meters height above average terrain. Since June 3, 1994, WIIZ(FM) has remained silent pursuant to special temporary authority.

[2] University and KGB are licensees of radio stations licensed to the same communities or serving the same market as WIIZ(FM) and thus have standing to file their Joint Petition to Deny. *See FCC v. Sanders Brothers Radio Station*, 309 U.S. 470 (1940).

[3] Pursuant to 47 C.F.R. § 73.3587, we will treat Patrick's letter as an informal objection to the instant application.

[4] The 11 stations are: WCFY(AM), Lafayette, IN; WKHY(FM), Lafayette, IN; WAZY(FM), Lafayette, IN; WGLM(FM), West Lafayette, IN; WBAA(AM), West Lafayette, IN; WILO(AM), Frankfort, IN; WSHW(FM), Frankfort, IN; WNJY(FM), Delphi, IN; WGBD(FM), Attica, IN (previously WBQR(FM)); WEZV(FM), Brookston, IN and WIMC(FM), Crawfordsville, IN.

[5] Section 73.3555(a)(1) states in pertinent part that:

> [i]n radio markets with 14 or fewer commercial radio stations, a party may own up to 3 commercial radio stations, no more than 2 of which are in the same service (AM or FM), provided that the owned stations... represent less than 50 percent of the stations in the market. 47 C.F.R. § 73.3555.

[6] Section 73.3555(a)(1) states in pertinent part that:

> [i]n radio markets with 15 or more commercial radio stations, a party may own up to 2 AM and 2 FM commercial radio stations, provided, however, that evidence that grant of any application will result in a combined audience share exceeding 25 percent will be considered prima *facie* inconsistent with the public interest. 47 C.F.R. § 73.3555.

[7] Schurz's opposition also amends it original calculation of the relevant market to include a total of 10, rather than 11, stations

sion's intent to exclude such stations is unmistakable." With respect to WMRS(FM), Schurz asserts that Petitioners' use of actual field strength measurements is "unavailing." Schurz argues that Section 73.3555(a) "unambiguously" calls for the use of predicted rather than actual community contours when calculating the number of FM stations in a market. Schurz maintains that WMRS(FM)'s principal community contour, when predicted in accordance with 47 C.F.R. § 73.313, "while coming close," does not overlap with that of WKOA(FM).[8] Regarding Petitioners' allegation that WKOA(FM)'s potential for increased facilities creates a larger market than stated in the instant application, Schurz contends that the Commission has never indicated that stations operating at less than full tower height permitted for a respective station class should be treated any differently for the purposes of the multiple ownership rules.

Petitioners reply that WBAA-FM and WBAA(AM) should be included in the relevant market because they both operate on unreserved channels and, as such, might convert to commercial operations at any time.[9] Petitioners further argue that the plain language of Section 73.3555 does not limit the relevant market to "commercially-operated" radio stations, but instead includes all stations in the commercial band, whether or not they operate commercially. In response to Schurz's contention that WMRS(FM) and WKOA(FM)'s predicted principal community contours are merely proximate but not overlapping, Petitioners assert that Schurz bases its predictions upon outdated data. Specifically, Petitioners contend that Schurz's engineer has predicted WMRS(FM)'s contour based upon an ERP of 2.5 kW rather than its authorized 4.4 kW ERP.[10] Petitioners further assert that WMRS(FM) and WKOA(FM)'s contours overlap when predicted utilizing an NBS Technical Note 101 ("Tech Note 101") study. Petitioners contend that the Tech Note 101 study also reveals that WKOA(FM)'s contour overlaps with four additional stations not previously listed, thus creating a market of 19 stations.[11] Additionally, Petitioners maintain that the use of field strength measurements is appropriate because "stations whose contours actually overlap raise the same concerns regarding market concentration as stations whose predicted contours overlap."

Schurz subsequently filed a Motion to Strike asserting that Petitioners' use of Tech Note 101 is procedurally and substantively improper. Procedurally, Schurz argues that Tech Note 101 constitutes prohibited new matter introduced for the first time in the Petitioners' reply. Substantively, Schurz argues that Petitioners have not made the required showing that would allow the supplemental use of Tech Note 101.[12] Petitioners respond that Tech Note 101 does not constitute new matter. They argue that Tech Note 101 merely augments their original assertion that WKOA(FM) and WMRS(FM)'s predicted community contours overlap.

Discussion. Petitioners' contention that the relevant market contains more than 15 stations is without merit. Although located within the commercial band, WBAA(AM) and WBAA-FM, owned by Purdue University, are licensed as noncommercial educational stations.[13] The Commission has clearly indicated that noncommercial stations are excluded from the relevant market: "[t]he number of stations in a radio market, is the number of *commercial* stations whose principal community contours overlap, in whole or in part, with the principal community contours of the stations in question." 47 C.F.R. § 73.3555(a)(3)(ii) (emphasis added); *see also* Revision of Radio Rules, *Memorandum Opinion and Order/First Recon. Order ("MO&O")*, 7 FCC Rcd 6387 at 6395 (1992) (relevant market excludes noncommercial stations since they do not compete for commercial advertising, and are generally not included in reported ratings surveys). Petitioners' argument that WBAA(AM) and WBAA-FM could switch "at anytime" to commercial service is unavailing, as such action would require prior Commission approval. Equally unavailing is Petitioners' assertion that the relevant market should include additional stations because WKOA(FM) could potentially increase its tower height to the maximum height for a Class B facility. For the purposes of determining compliance with our multiple ownership rules, we decline to speculate on whether a licensee might, in the future, request modifications that would result in noncompliance with our Rules.

We also find that Petitioners' contention that the relevant market consists of 19 stations, when WKOA(FM)'s contour is predicted using Tech Note 101, to be without merit.[14] In a multiple ownership context, where an application conforms with our rules utilizing the standard prediction method set forth in 47 C.F.R. § 73.313, we will not accept alternative prediction methods. Requiring applicants with conforming applications to defend those applications against alternative prediction methodologies would result in unreasonable delay to the applicants and unnecessary administrative burden upon the limited technological resources available to the Commission for evaluating alternative prediction studies. Using the standard prediction method mandated by 47 C.F.R. § 73.313, we conclude that Schurz's application conforms to the requirements of 47

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in addition to the subject stations. Schurz explains that it had "inadvertently" included WBAA(AM), a non-commercial educational station.

[8] Section 73.3555(a)(3)(i) defines the principal community contour for FM stations as "the predicted 3.16 mV/m contour computed in accordance with § 73.313." Section 73.313 sets forth a method for predictions of coverage on the basis of estimated field strengths utilizing the F(50,50) field strength chart.

[9] Petitioners claim that Schurz has erroneously dropped WBAA(AM) from its list of stations in the relevant market.

[10] WMRS(FM) is licensed to operate at 4.4 kW ERP. *See* File No. BMLH-900503KF.

[11] These stations are WWKI(FM), Kokomo, IN; WIBN(FM), Earl Park, IN; WCLV(FM), Cleveland, OH and WIBC(AM), Indianapolis, IN.

[12] Schurz cites to 47 C.F.R. § 73.313(e). That subsection permits supplemental showings, in addition to the standard prediction method, in instances "where the terrain in one or more directions from the antenna site departs widely from the average elevation." 47 C.F.R. § 73.313(e).

[13] *See* File Nos. BR-890403VG (WBAA(AM)) and BLED-930210KB (WBAA-FM).

[14] Petitioners' use of Tech Note 101 to argue that the market consists of 19 stations constitutes new matter raised for the first time in its reply. The Commission's Rules strictly limit reply pleadings to matters previously raised in the opposition. *See* 47 C.F.R. § 1.45(b). Nevertheless, in this instance, we find it to be in the public interest to consider the Tech Note 101 allegations. *See Newhouse Broadcasting Corp.*, 61 F.C.C.2d 528 (1976). Accordingly, we deny Schurz's Motion to Strike, but accept its response contained therein.

C.F.R. § 73.3555. Therefore, we decline to add the four additional stations identified by Petitioners based upon an alternative prediction method.[13]

For the foregoing reasons, we find that the relevant market, including WMRS(FM),[16] contains 14 stations.[17] Schurz proposes to own three stations, no more than two same-service, in a market where the subject stations would comprise less than fifty percent of the stations in the market.[18] Therefore, Schurz's acquisition of WIIZ(FM) conforms with 47 C.F.R. § 73.3555.

Conclusion. University Broadcasting Company, L.P. and KGB Broadcasting's Joint Petition to Deny IS DENIED. Bruce A. Patrick's informal objection IS DENIED. The application to assign station WIIZ(FM), Battle Ground, Indiana, from Wizard Broadcasting, Inc. to Schurz Communications, Inc. (File No. BALH-940516GI) IS GRANTED.

Sincerely,

Larry D. Eads, Chief
Audio Services Division
Mass Media Bureau

cc. Richard S. Rodin, Esq.
Mr. Bruce A. Patrick

[15] *See* note 10, *supra*.

[16] Although Petitioners argue that Schurz has failed to predict WMRS(FM)'s contour using the correct ERP, we note that WMRS(FM) has recently been granted a major change modification to relocate its transmitter, increase tower height to 157 meters HAAT and decrease power to 2.5 ERP (File No. BPH-941028IF). Accordingly, *Eads Broadcasting Corp.*, 9 FCC Rcd 2859 (1994) requires an evaluation of both the presently authorized facility and the relevant proposed or authorized modified facility. We find that the facilities authorized in File No. BPH-941028IF place a predicted contour overlap with the subject relevant market. We thus include WMRS(FM) within the relevant market.

[17] The 14 stations are: WIIZ(FM), Battle Ground, IN; WKOA(FM), Lafayette, IN; WASK(AM), Lafayette, IN; WMRS(FM), Monticello, IN; WCFY(AM), Lafayette, IN; WKHY(FM), Lafayette, IN; WAZY(FM), Lafayette, IN; WGLM(FM), West Lafayette, IN; WILO(AM), Frankfort, IN; WSHW(FM), Frankfort, IN; WNJY(FM), Delphi, IN; WGBD(FM), Attica, IN (previously WBQR(FM)); WEZV(FM), Brookston, IN and WIMC(FM), Crawfordsville, IN.

[18] As noted above, the relevant market is not Lafayette, Indiana, but the area formed by the overlapping contours of the stations in the proposed combination. *See* 47 C.F.R. § 73.3555(a)(3)(ii). Patrick's objection to the alleged concentration in Lafayette is therefore without merit.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

BOARD OF REGENTS, EASTERN NEW MEXICO UNIVERSITY
Caprock, New Mexico — File No. BPLIF-921230DB

DEXTER HIGH SCHOOL
Greenfield, New Mexico — File No. BPLIF-920501DR

For Construction Permit and License
in the Instructional Television Fixed
Service on Channels A1-A4.

MEMORANDUM OPINION AND ORDER

Adopted: March 9, 1995; Released: March 20, 1995

By the Commission:

1. The Commission has before it for consideration the above-captioned mutually exclusive applications of Board of Regents, Eastern New Mexico University (Eastern) and Dexter High School (Dexter High), each seeking a construction permit and license in the Instructional Television Fixed Service (ITFS) on Channels A1-A4 in the areas of Caprock and Greenfield, New Mexico, respectively.

BASIC ELIGIBILITY

2. Before applying the mutually exclusive selection procedure to determine the number of merit points to be awarded to each applicant, we must first ascertain the basic eligibility of the applicants. Educational institutions and governmental organizations that propose to serve either their own enrolled students or students at accredited schools within their respective jurisdictions establish their eligibility by accreditation from the appropriate state department of education or a recognized regional or national accrediting organization. Other ITFS applicants that propose to serve students at accredited schools outside of their respective jurisdictions must, to be eligible, submit letters of intended use from those schools and establish local program committees in those communities. See 47 C.F.R. Section 74.932(a) (1)-(5). Both applicants are qualified to be ITFS licensees. Eastern is accredited by the North Central Association and is proposing to serve the formal educational needs of its own students. Dexter High is accredited by the State of New Mexico, Department of Education and it too is proposing to provide ITFS service to its own students.

FOUR-CHANNEL WAIVER REQUEST

3. Section 74.902(d) of the Commission's Rules limits the assignment of more than four ITFS channels to one licensee for use in a single area of operation. In interpreting this provision, we have construed parties under common control to be the same licensee, albeit the authorizations are held in the name of separate parties. Here, Dexter High is a high school under the control and supervision of Dexter Consolidated Schools, whose Superintendent, Jimmy L. Derrick, signed the Dexter High application on behalf of that applicant. Mr. Derrick also signed and submitted on behalf of Dexter Junior High School an ITFS application for construction and operation on the C-channel group in Greenfield, New Mexico (BPLIF-920501DB). The latter application was not mutually exclusive with any other ITFS application and, upon finding Dexter Junior High School fully qualified to be an ITFS licensee, BPLIF-920501DB was granted by the staff on November 18, 1994. Since these applications were fiied under the aegis of the same county public school system, Dexter High requests a waiver of the four-channel limitation.

4. An applicant seeking waiver of Section 74.902(d) of the Commission's Rules must demonstrate how the additional channels will be used for traditional ITFS purposes and why present channel capacity is insufficient to accommodate the additional needs. *Instructional Television Fixed Service - Report and Order in MM Docket 83-523*, 98 FCC 2d 925, 933 (1984). In assessing such showings, we stated that waivers may be granted "only where the applicant can overcome a heavy burden of proof." *Instructional Television Fixed Service - Second Report and Order in MM Docket 83-523 Reconsideration Reconsidered*, 59 RR2d 1355, 1376, (1986). Among the factors we consider in our *ad hoc* approach to requests for waiver of the four-channel limitation, are the amount of ITFS programming that is being proposed on all of the channels involved, the simultaneous use of the channels for a substantial portion of the day, the extent of repetition of the programming and a demonstrated need for the additional channels. See *School District No. 1 in the City and County of Denver*, 3 FCC Rcd 6392, 6393 (1988).

5. We are persuaded that Dexter High has demonstrated that the requested channels are necessary to provide the wide range of educational and instructional programming proposed. We have reviewed the showing proffered by Dexter High, as well as the programming proposal set forth in the application filed by Dexter Junior High School. As amended, their applications reflect an average of 40 hours of ITFS programming per channel per week.[1] We further note that both schools amended their excess capacity leases with Ruralvision South, Inc. to require a minimum of 40 hours per channel per week to be devoted to formal educational programming. Each channel is devoted to a different

[1] Dexter High's amendment was filed subsequent to the "B" cut-off date of November 9, 1993. While we will allow Dexter High to perfect its four-channel waiver request by such an amendment, that amendment will not be considered in our comparative analysis of the applicants.

grade level. Dexter Junior High school will provide programming for children in elementary through middle school, and Dexter High's channels will provide programming for students in high school. There is no repetition among the programs, and the programming on all eight channels will be presented simultaneously between 8:00 a.m. and 4:30 p.m., Monday through Saturday. This comprehensive schedule for over eight different grade levels would not be possible on only four channels. Moreover, Dexter Consolidated Schools states that its school system is located in an economically challenged rural area that could not afford any advanced educational instruction without the assistance of ITFS. In view of the foregoing, we believe that grant of the waiver requested by Dexter High is warranted.

MUTUALLY EXCLUSIVE SELECTION PROCEDURE

6. In cases of mutually exclusive applications, where applicants are competing for the same or adjacent channels in the same geographic area, each application is reviewed pursuant to our comparative process. This procedure awards a maximum of twelve merit points based on five criteria deemed to be most relevant to predicting the applicant best qualified to provide the service for which the ITFS spectrum has been allocated. *Instructional Television Fixed Service - Second Report and Order in MM Docket No. 83-523, (Second Report and Order)*, 101 FCC 2d 49, 65-72 (1985); 47 C.F.R. Section 74.913. First, four points are awarded to local applicants.[2] Second, three points are awarded to applicants which are accredited schools, educational institutions, or school boards and school districts applying within their jurisdictions. Third, two points are awarded to applicants whose requests would result in the acquisition by these applicants of four or fewer ITFS channels within the particular area. Fourth, either one or two points may be awarded to applicants for specified levels of proposed ITFS programming.[3] Fifth, one point is awarded to applicants which are existing E or F channel licensees seeking to relocate on another ITFS channel group, where such applicants show an established need for an expanded service that cannot be accommodated on their grandfathered E or F facilities. The tentative selectee is the applicant with the highest score.

7. Under this comparative selection process, the applicants are awarded points based on the following criteria:

Localism. Eastern is entitled to four points because it is an educational institution that proposes to serve the formal education needs of its own students. Dexter High is also entitled to four points because it is a high school that proposes to offer programming to its own students.

Accreditation. Both applicants are entitled to three points under this criterion. Eastern is accredited by the North Central Association, whereas Dexter High is accredited by the State of New Mexico, Department of Education.

Four-Channel Limitation. Eastern is neither the licensee of, nor has filed an application for, additional ITFS channels in its proposed service area. Therefore, Eastern is entitled to two points for remaining within the four-channel limitation. Dexter Junior High School has received a construction permit/license authorization for an ITFS facility to operate on Channels C1-C4 in the same area as Dexter High's proposed ITFS facility which, if granted, would result in eight ITFS channels being under the control of the same county public school system. Accordingly, Dexter High is not entitled to any merit points under this criterion. See *Second Report and Order*, 101 FCC 2d at 69-70; and *Northern Arizona University Foundation*, 7 FCC Rcd 5943 (1992).

Instructional Programming. ITFS applicants detail their formal educational and other ITFS programming proposals in both a program schedule and a programming "grid." Eastern's illustrative schedule and programming grid propose an average of 69.5 hours of formal educational programming per channel per week. Thus, Eastern is entitled to two programming merit points. In contrast, the illustrative schedule and programming grid initially set forth in Dexter High's application propose an average of 24.375 hours of formal educational programming. Consequently, Dexter High is only entitled to one programming merit point.

E- and F- Channel Group Relocation. Neither applicant is the current licensee of an E or F channel seeking to relocate to other channels. Therefore, no applicant is entitled to the one point for such applicants.

Total. Eastern is entitled to four points for being local, three points for being accredited, two points for observing the four-channel limitation, and two points for proposing at least 41 hours of formal educational programming per channel per week, for a total of eleven points. Dexter High is entitled to four points for being local, three points for being accredited, and one point for proposing at least 21 hours of formal educational programming per channel per week, for a total of eight points. Thus, the tentative selectee is Eastern.

OTHER MATTERS

8. Eastern does not propose to lease its excess capacity for non-ITFS use, as permitted by Section 74.931. Rather, it intends to finance the construction and operation of its station by reliance upon a grant from the National Telecommunications and Information Administration (NTIA). The certification of reliance on NTIA funding in response to Question 1(a) of Section III, FCC Form 330, establishes "reasonable assurance" of Eastern's financial ability to construct and operate the proposed station. Accordingly, our concern will be directed to focusing on whether the grant relied upon actually has been made. See *Hispanic Information and Telecommunications Network, Inc.*, 7 FCC Rcd 5924, 5926-27. (1992).

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[2] A "local" applicant is an institution or organization that is physically located in the community or metropolitan area where service is proposed. *Second Report and Order*, 101 FCC 2d at 59; 47 C.F.R. Section 74.932, Note 1.

[3] One point is awarded for a proposed weekly schedule of at least 21 average hours per channel of formal educational programming or of at least 41 average hours per channel of other ITFS programming. Two points are awarded for a proposed weekly schedule of at least 41 average hours per channel of formal educational programming or at least 61 hours per channel of ITFS programming where at least 21 of those hours are formal educational programming. 47 C.F.R. Section 74.913(b)(4).

9. No petitions to deny or informal objections have been filed against Eastern's application, and we find Eastern fully qualified to be an ITFS licensee. We also conclude that grant of the Eastern's application would serve the public interest, convenience and necessity.

10. Accordingly, IT IS ORDERED, That the request for a waiver of the four-channel limitation filed by Dexter High IS GRANTED, that the application of Dexter High School (BPLIF-920501DR) IS DENIED, and the application of Board of Regents, Eastern New Mexico University (BPLIF-921230DB) IS GRANTED, subject to the condition that it submit satisfactory proof to the Commission within a reasonable period of time that it has received the proposed funding from the National Telecommunications and Information Administration.

11. IT IS FURTHER ORDERED, That the staff of the Mass Media Bureau shall send copies of this decision to the applicants by certified mail, return receipt requested.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

TRI-VALLEY SCHOOL DISTRICT #49-6
Montrose, South Dakota — File No. BPLIF-920320DD

UNIVERSITY OF SOUTH DAKOTA
Harrisburg, South Dakota — File No. BPLIF-920901DA

For Construction Permit and License
in the Instructional
Television Fixed Service on
Channels B1, B2, B3, and B4.

MEMORANDUM OPINION AND ORDER

Adopted: March 9, 1995; Released: March 20, 1995

By the Commission:

1. The Commission has before it for consideration the above-captioned mutually exclusive applications of Tri-Valley School District #49-6 (Tri-Valley) and University of South Dakota (University), each seeking a construction permit and license in the Instructional Television Fixed Service (ITFS) on Channels B1-B4 in the areas of Montrose and Harrisburg, South Dakota, respectively.

BASIC ELIGIBILITY

2. Before applying the mutually exclusive selection procedure to determine the number of merit points to be awarded to each applicant, we must first ascertain the basic eligibility of the applicants. Educational institutions and governmental organizations that propose to serve either their own enrolled students or students at accredited schools within their respective jurisdictions establish their eligibility by accreditation from the appropriate state department of education or a recognized regional or national accrediting organization. Other ITFS applicants that propose to serve students at accredited schools outside of their respective jurisdictions must, to be eligible, submit letters of intended use from those schools and establish local program committees in those communities. See 47 C.F.R. Section 74.932(a)(1)-(5). Both applicants are qualified to be ITFS licensees. Tri-Valley is a school district that is accredited by the South Dakota State Board of Education and that proposes to serve the formal educational needs of students enrolled in schools both within and outside its jurisdiction. University, which is accredited by the North Central Association of Colleges and Schools, proposes to provide formal educational programming to its enrolled students at on-campus and off-campus sites.

MUTUALLY EXCLUSIVE SELECTION PROCEDURE

3. In cases of mutually exclusive ITFS applications, where applicants are competing for the same or adjacent channels in the same geographic area, each application is reviewed pursuant to our comparative process. This procedure awards a maximum of twelve merit points based on five criteria deemed to be most relevant to predicting the applicant best qualified to provide the service for which the ITFS spectrum has been allocated. *Instructional Television Fixed Service - Second Report and Order in MM Docket No. 83-523 (Second Report and Order)*, 101 FCC 2d 49, 65-72 (1985); 47 C.F.R. Section 74.913. First, four points are awarded to local applicants.[1] Second, three points are awarded to applicants which are accredited schools, educational institutions or school boards and school districts applying within their jurisdictions. Third, two points are awarded to applicants whose requests would result in the acquisition by these applicants of four or fewer ITFS channels within the particular area. Fourth, either one or two points may be awarded to applicants for specified levels of proposed ITFS programming.[2] Fifth, one point is awarded to applicants which are existing E or F channel licensees seeking to relocate on another ITFS channel group, where such applicants show anestablished need for an expanded service that cannot be accommodated on their grandfathered E or F facilities. The tentative selectee is the applicant with the highest score.

4. Under this comparative selection process, the applicants are awarded points based on the following criteria:

Localism. Each applicant is entitled to four points for being local. Tri-Valley proposes to serve the formal educational needs of students enrolled in schools within its jurisdiction, whereas University proposes to serve its own enolled students.

Accreditation. Tri-Valley, accredited by the South Dakota State Board of Education, is entitled to three points for accreditation. University, accredited by the North Central Association of Colleges and Schools, is likewise entitled to three points.

Four-Channel Limitation. Neither applicant is the licensee of, or has filed applications for, additional ITFS channels in its proposed service area. Consequently, each applicant is entitled to two points for remaining within the four-channel limitation.

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[1] A "local" applicant is an institution or organization that is physically located in the community or metropolitan area where service is proposed. *Second Report and Order*, 101 FCC 2d at 59; 47 C.F.R. Section 74.932, Note 1.

[2] One point is awarded for a proposed weekly schedule of at least 21 average hours per channel of formal educational programming or of at least 41 average hours per channel of other ITFS programming. Two points are awarded for a proposed weekly schedule of at least 41 average hours per channel of formal educational programming or at least 61 hours per channel of ITFS programming where at least 21 of those hours are formal educational programming. 47 C.F.R. Section 74.913(b)(4).

Instructional Programming. ITFS applicants detail their formal educational and other ITFS programming proposals in both a program schedule and a programming "grid". Tri-Valley's illustrative schedule and program grid propose an average of 24.375 hours of formal educational programming per channel per week. Therefore, Tri-Valley is entitled to one program merit point. In contrast, University's illustrative schedule and grid propose an average of 42 hours of ITFS programming per channel per week, all of which is designated as formal educational programming. Therefore, University is entitled to two programming merit points.

E- and F- Channel Group Relocation. Neither applicant is the current licensee of an E or F channel seeking to relocate to other channels. Consequently, no applicant is entitled to the one point for such applicants.

Total. Tri-Valley is entitled to four points for being local, three points for being accredited, two points for observing the four-channel limitation, and one point for proposing at least 21 hours of formal educational programming per channel per week, for a total of ten points. University is entitled to four points for being local, three points for being accredited, two points for observing the four-channel limitation, and two points for proposing at least 41 hours of formal educational programming per channel per week, for a total of eleven points. Thus, University is the tentative selectee.

OTHER MATTERS

5. University proposes to lease its excess capacity for non-ITFS use, as permitted by 47 C.F.R. Section 74.931. University has submitted a copy of its lease with Family Entertainment Network, Inc., which conforms in all respects with our requirements.

6. No petitions to deny or informal objections have been filed against University's application, and we find University fully qualified to be an ITFS licensee. We also conclude that grant of University's application would serve the public interest, convenience and necessity.

7. Accordingly, IT IS ORDERED, That the application of Tri-Valley School District #49-6 (BPLIF-920320DD) IS DENIED, and the application of University of South Dakota (BPLIF-920901DA) IS GRANTED.

8. IT IS FURTHER ORDERED, That the staff of the Mass Media Bureau shall send copies of this decision to the applicants by certified mail, return receipt requested.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

CENTRAL CASS PUBLIC SCHOOL DISTRICT
Walcott, North Dakota — File No. BPLIF-921016DM

INDEPENDENT SCHOOL DISTRICT 146
Barnesville, Minnesota — File No. BPLIF-931230DF

For Construction Permit and License
in the Instructional Television
Fixed Service on Channels G1, G2,
G3, and G4.

MEMORANDUM OPINION AND ORDER

Adopted: March 9, 1995; Released: March 20, 1995

By the Commission:

1. The Commission has before it for consideration the above-captioned mutually exclusive applications of Central Cass Public School District (Central) and Independent School District 146 (Independent), each seeking a construction permit and license in the Instructional Television Fixed Service (ITFS) on Channels G1-G4 in the areas of Walcott, North Dakota and Barnesville, Minnesota, respectively.

BASIC ELIGIBILITY

2. Before applying the mutually exclusive selection procedure to determine the number of merit points to be awarded to each applicant, we must first ascertain the basic eligibility of the applicants. Educational institutions and governmental organizations that propose to serve either their own enrolled students or students at accredited schools within their respective jurisdictions establish their eligibility by accreditation from the appropriate state department of education or a recognized regional or national accrediting organization. Other ITFS applicants that propose to serve students at accredited schools outside of their respective jurisdictions must, to be eligible, submit letters of intended use from those schools and establish local program committees in those communities. See 47 C.F.R. Section 74.932(a)(1)-(5). Both applicants are qualified to be ITFS licensees. Both applicants are school districts that propose to provide formal educational programming to schools within and outside their jurisdictions. Central is accredited by the North Dakota Department of Public Instruction, and Independent is accredited by the Minnesota Department of Education.

MUTUALLY EXCLUSIVE SELECTION PROCEDURE

3. In cases of mutually exclusive ITFS applications, where applicants are competing for the same or adjacent channels in the same geographic area, each application is reviewed pursuant to our comparative process. This procedure awards a maximum of twelve merit points based on five criteria deemed to be most relevant to predicting the applicant best qualified to provide the service for which the ITFS spectrum has been allocated. *Instructional Television Fixed Service - Second Report and Order in MM Docket No. 83-523, (Second Report and Order)*, 101 FCC 2d 49, 65-72 (1985); 47 C.F.R. Section 74.913. First, four points are awarded to local applicants.[1] Second, three points are awarded to applicants which are accredited schools, educational institutions, or school boards and school districts applying within their jurisdictions. Third, two points are awarded to applicants whose requests would result in the acquisition by these applicants of four or fewer ITFS channels within the particular area. Fourth, either one or two points may be awarded to applicants for specified levels of proposed ITFS programming.[2] Fifth, one point is awarded to applicants which are existing E or F channel licensees seeking to relocate on another ITFS channel group, where such applicants show an established need for an expanded service that cannot be accommodated on their grandfathered E or F facilities. The tentative selectee is the applicant with the highest score.

4. Under this comparative selection process, the applicants are awarded points based on the following criteria:

Localism. Each applicant is entitled to four points for being local. Central and Independent are school districts that propose to serve the formal educational needs of students enrolled at schools within their jurisdictions.

Accreditation. Each applicant is entitled to three points for being accredited. Central is accredited by the North Dakota Department of Public Instruction, whereas Independent is accredited by the Minnesota Department of Education.

Four-Channel Limitation. Neither applicant is the licensee of, or has filed applications for, additional ITFS channels in its proposed service area. Therefore, each applicant is entitled to two points for remaining within the four-channel limitation.

Instructional Programming. ITFS applicants detail their formal educational and other ITFS programming proposals in both a program schedule and a programming "grid." Central's illustrative schedule and programming grid pro-

[1] A "local" applicant is an institution or organization that is physically located in the community or metropolitan area where service is proposed. *Second Report and Order;* 101 FCC 2d at 59; 47 C.F.R. Section 74.932, Note 1.

[2] One point is awarded for a proposed weekly schedule of at least 21 average hours per channel of formal educational programming or of at least 41 average hours per channel of other ITFS programming. Two points are awarded for a proposed weekly schedule of at least 41 average hours per channel of formal educational programming or at least 61 hours per channel of ITFS programming where at least 21 of those hours are formal educational programming. 47 C.F.R. Section 74.913(b)(4).

pose an average of 24.375 hours of formal educational programming per channel per week. Therefore, Central is entitled to one programming merit point. In contrast, Independent's illustrative schedule and grid propose an average of 42 hours of formal educational programming per channel per week. Therefore, Independent is entitled to two programming merit points.

E- and F- Channel Group Relocation. Neither applicant is the current licensee of an E or F channel seeking to relocate to other channels. Consequently, no applicant is entitled to the one point for such applicants.

Total. Central is entitled to four points for being local, three points for being accredited, two points for observing the four-channel limitation, and one point for proposing at least 21 hours of formal educational programming per channel per week, for a total of ten points. Independent is entitled to four points for being local, three points for being accredited, two points for observing the four-channel limitation, and two points for proposing at least 41 hours of formal educational programming per channel per week, for a total of eleven points. Thus, the tentative selectee is Independent.

OTHER MATTERS

5. Independent proposes to lease excess capacity for non-ITFS use, as permitted by Section 74.931. Independent has submitted a copy of the lease agreement it executed with Family Entertainment Network Partnership. The lease agreement, however, does not conform in all respects with the Commission's requirements for such agreements. Section 12(c)(iii) of the lease requires any propective assignee or purchaser of the ITFS station to assume and agree to be bound by all of the terms and conditions of the lease agreement, as if the purchaser were the original lessor. We believe that such a provision places an unreasonable impediment on the assignment or transfer of the ITFS facility. *Second Report and Order,* 101 FCC 2d at 90. Although this provision is inconsistent with our requirements for excess capacity leases, it neither reflects on the applicant's basic or comparative qualifications, nor precludes grant of an authorization. See *Van Vleck Independent School District,* 7 FCC Rcd 7231, 7233 (1992). Accordingly, Independent's authorization will be conditioned upon conformity of the lease to Commission requirements.

6. No petitions to deny or informal objections have been filed against Independent's application. and we find Independent fully qualified to be an ITFS licensee. We also conclude that grant of Independent's application would serve the public interest, convenience and necessity.

7. Accordingly, IT IS ORDERED, That the application of Central Cass Public School District (BPLIF-921016DM) IS DENIED, and the application of Independent School District 146 (BPLIF-931230DF) IS GRANTED, subject to the condition that within 30 days from the release date of this Order, Independent School District 146 submits to the Chief, Distribution Services Branch for approval, information demonstrating compliance with Commission requirements. including, if appropriate, an amended excess capacity lease conforming in the manner discussed herein.

8. IT IS FURTHER ORDERED, That the staff of the Mass Media Bureau shall send copies of this decision to the applicants by certified mail, return receipt requested.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

ET Docket No. 92-28

In the Matter of

Amendment of Section 2.106 of the
Commission's Rules to Allocate the
1610-1626.5 MHz and the 2483.5-2500 MHz
Bands for Use by the Mobile-Satellite Service
Including Non-Geostationary Satellites

MEMORANDUM OPINION AND ORDER

Adopted: February 24, 1995; Released: March 20, 1995

By the Commission:

INTRODUCTION

1. By this action, we respond to a Petition for Reconsideration of the *Report and Order* (*R&O*)[1] submitted by Loral Qualcomm Satellite Services, Inc. (LQSS). We clarify that the *R&O* allocated the 1610-1626.5 MHz (1.6 GHz) and 2483.5-2500 MHz (2.4 GHz) bands for geostationary orbit (GSO) and non-geostationary orbit (low-Earth orbit or LEO) mobile-satellite service (MSS) use, but made no finding as to whether both types of systems would be authorized. We also clarify the meaning of international footnotes RR753F and RR731E, but defer to the 1995 World Radiocommunication Conference (WRC-95) action on modification of these footnotes.[2] Finally, we will explore with the National Telecommunications and Information Administration (NTIA) the possibility of making spectrum in Government or shared Government/non-Government bands available to assist in satisfying MSS/radiodetermination satellite service (RDSS) feeder link requirements.

BACKGROUND

2. In the *R&O*, we allocated the 1.6 and 2.4 GHz bands for LEO and GSO MSS on a co-primary basis with the existing RDSS. We stated that this allocation will support the growing demand for mobile communications and permit the introduction of new satellite services -- including voice, facsimile, and data applications -- and facilitate the availability of such services on a worldwide basis. We further noted that the allocation is identical to that adopted internationally by the 1992 World Administrative Radio Conference (WARC-92).

3. In the *R&O*, we also adopted international coordination and notification procedures specified by WARC-92. In particular, we adopted International Telecommunication Union (ITU) footnote 753F (RR753F), which deals with coordination between MSS/RDSS space stations and terrestrial services in the 2.4 GHz space-to-Earth band; and ITU Footnote 731E (RR731E), which deals with coordination between MSS/RDSS Earth stations and terrestrial services in the 1.6 GHz Earth-to-space band.[3] Additionally, we declined requests by LEO MSS proponents to propose specific new allocations for feeder links,[4] stating that existing fixed-satellite service (FSS) bands can be used for this purpose.

4. On March 30, 1994, LQSS filed a Petition for Clarification and Partial Reconsideration of the *R&O*.[5] LQSS generally supports our co-primary MSS and RDSS allocation at 1.6 and 2.4 GHz. However, it contends that we should clarify and modify four aspects of the *R&O* in order to promote the timely introduction of new satellite services and to make them of optimum benefit to the public. Specifically, LQSS requests that we:

- clarify that the *R&O* was intended only to allocate spectrum for MSS and does not establish system eligibility (i.e., LEO or GSO) requirements for MSS licensees;

- increase the power flux density (PFD) values in RR753F and clarify that these values represent thresholds that determine when coordination with terrestrial users is required, rather than absolute limits;

- modify RR731E to apply a -15 dBW/4 kHz limit on effective isotropic radiated power to all MSS uplinks and eliminate the part of the footnote regarding protection of aeronautical radionavigation systems; and

- identify spectrum below 15 GHz that can be used for LEO MSS feeder links.

DISCUSSION

5. *Licensee Eligibility*. LQSS requests that we clarify that the *R&O* addressed matters related only to the allocation of spectrum and did not address the eligibility of different types of systems to operate in that spectrum. It notes that

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[1] *See Report and Order*, ET Docket No. 92-28, 9 FCC Rcd 536 (1993).

[2] We note that Loral Qualcomm is participating in industry advisory panels that are in the process of developing the U.S. position for WRC-95.

[3] We allocated the 2.4 GHz band on a primary basis for space-to-Earth operations and the 1.6 GHz basis on a primary basis for Earth-to-space operations. Additionally, we allocated the 1613.8-1626.5 MHz portion of the 1.6 GHz band on a secondary basis for space-to-Earth operations to provide for potential bi-directional use in this portion of the band.

[4] Feeder links interconnect a mobile satellite system with other communications networks or user transceivers by means of one or more central Earth stations. Because these Earth stations are at fixed locations, feeder links use frequencies allocated to the fixed-satellite service.

[5] LQSS is one of five applicants seeking authority to construct, launch, and operate a LEO mobile-satellite service. The other applicants are Constellation Communications, Inc. (Constellation), Ellipsat Corporation (Ellipsat), Motorola Satellite Communications Inc., and TRW, Inc. (TRW). Further, AMSC Subsidiary Corporation (AMSC) is seeking authority to operate a GSO system in these bands.

in the *Notice of Proposed Rule Making* (*Notice*) in CC Docket No. 92-166 subsequent to the *R&O*, we proposed MSS service rules that recognized that LEO systems have a technological advantage over GSO systems.[6] LQSS therefore maintains that we should clarify that the *R&O* did not find that it is in the public interest to license both LEO and GSO systems in the 1.6 and 2.4 GHz bands.

6. In its response, AMSC opposes any restrictions on GSO use of the 1.6 and 2.4 GHz bands. However, it concurs with LQSS that the MSS service rules proceeding is the appropriate forum to address the eligibility issue.

7. As LQSS contends, we made no finding on the desirability of LEO versus GSO systems in the *R&O*. Further, in the recent *Report and Order* in the service rules proceeding, we required MSS systems licensed in the 1.6 and 2.4 GHz bands to operate in non-geostationary orbits.[7] Accordingly, we are clarifying that in the *R&O* we addressed matters related only to the allocation of spectrum and did not address the eligibility of different types of MSS systems to operate in that spectrum.

8. *International Footnote RR753F.* WARC-92 added RR753F worldwide in the 2.4 GHz band.[8] In the *R&O*, we adopted this footnote domestically by including it in our Table of Frequency Allocations.[9] LQSS urges that we increase the PFD limits prescribed by this footnote and clarify that these limits are only coordination thresholds, rather than absolute limits.[10] LQSS contends that RR753F imposes time-consuming and unnecessary coordination with terrestrial services. It states that the less restrictive PFD values it proposes would increase the availability and utility of MSS; and that clarifying that the PFD values are not absolute limits would eliminate inefficient coordination.

9. In its response, AMSC disagrees that the PFD values should be increased. According to AMSC, there is no technical basis for increasing these values. However, both AMSC and TRW support LQSS's request to clarify that these values represent only coordination thresholds.

10. In the *R&O*, we observed that the international footnotes adopted for the 2.4 GHz band by WARC-92 were intended to form the basis for international notification and coordination of various satellite systems, and to ensure that new and existing systems are afforded protection from harmful interference.[11] We therefore adopted these footnotes domestically, including RR753F. Notwithstanding LQSS's concern that the PFD values prescribed by RR753F may be excessively conservative, we believe that the proper forum for modifying these limits is WRC-95. We concur with LQSS and commenting parties, however, that these values were not intended as absolute limits by WARC-92 and should not be viewed as absolute limits for our domestic rules. Accordingly, we are clarifying that the PFD values prescribed by RR753F are coordination thresholds that may be exceeded with the consent of all affected administrations in these bands.

11. *International Footnote RR731E.* LQSS requests that we clarify that RR731E does not entitle aeronautical radionavigation services to levels of protection beyond that which can be achieved with the allowable EIRP limits.[12] It asks that we accomplish this either by deleting RR731E in its entirety or by implementing a U.S. footnote that applies the -15 dBW/4 kHz EIRP limit to all MSS uplinks and deletes the part of the international footnote regarding protection of aeronautical radionavigation systems. LQSS maintains that RR731E was adopted by WARC-92 to protect Swedish radar systems and the Russian Federation

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[6] *See Notice of Proposed Rule Making*, CC Docket No. 92-166, 9 FCC Rcd 1094 (1994), at para. 22.

[7] *See Report and Order*, CC Docket No. 92-166, 9 FCC Rcd 5936 (1994).

[8] RR753F states: "The use of the band 2483.5-2500 MHz by the mobile-satellite and the radiodetermination-satellite services is subject to the application of the coordination and notification procedures set forth in Resolution 46. Coordination of space stations of the mobile-satellite and radiodetermination-satellite services with respect to terrestrial services is required only if the power flux-density produced at the Earth's surface exceeds the limits in No. 2566. In respect of assignments operating in this band, the provisions of Section II, paragraph 2.2 of Resolution 46 shall also be applied to geostationary transmitting space stations with respect to terrestrial stations."

RR2566 states: "The power flux-density at the Earth's surface produced by emissions from a space station, including emissions from a reflecting satellite, for all conditions and for all methods of modulation, shall not exceed the following values:

-152 dB(W/m2) in any 4 kHz band for angles of arrival between 0 and 5 degrees above the horizontal plane;

-152 + 0.5(9-5) dB(W/m2) in any 4 kHz band for angles of arrival 9 (in degrees) between 5 and 25 degrees above the horizontal plane;

-142 dB(W/m2) in any 4 kHz band for angles of arrival between 25 and 90 degrees above the horizontal plane."

See international *Radio Regulations* RR753F and RR2566.

[9] *See* 47 C.F.R. § 2.106.

[10] LQSS proposes that we replace the values in RR2566 with the following:

-152 dB(W/m2) in any 4 kHz band for angles of arrival between 0 and 5 degrees above the horizontal plane;

-152 + 0.65(9-5) dB(W/m2) in any 4 kHz band for angles of arrival 9 (in degrees) between 5 and 25 degrees above the horizontal plane;

-139 dB(W/m2) in any 4 kHz band for angles of arrival between 25 and 90 degrees above the horizontal plane.

In our proceeding to develop U.S. proposals for WRC-95, LQSS also urges that we increase the PFD values. *See* comments of LQSS to the *Notice of Inquiry*, IC Docket No. 94-31, 9 FCC Rcd 2430 (1994).

[11] *See* note 1, *supra*.

[12] RR731E states: "The use of the band 1610-1626.5 MHz by the mobile-satellite service (Earth-to-space) and by the radiodetermination-satellite service (Earth-to-space) is subject to the application of the coordination and notification procedures set forth in Resolution 46 (WARC-92). A mobile earth station operation in either of the services in this band shall not produce an e.i.r.p. density in excess of -15 dB(W/4 kHz) in the part of the band used by systems operating in accordance with the provisions of No. 732, unless otherwise agreed by the affected administrations. In the part of the band where such systems are not operating, a value of -3 dB(W/4 kHz) is applicable. Stations of the mobile-satellite service shall not cause harmful interference to, or claim protection from, stations in the aeronautical radionavigation service, stations operating in accordance with the provisions of No. 732 and stations in the fixed service operating in accordance with the provisions of No. 730." RR 732 states: "The band 1610-1626.5 MHz is reserved on a worldwide basis for the use and development of airborne electronic aids to air navigation and any directly associated ground-based or satellite-borne facilities. Such satellite use is subject to agreement obtained under the procedure set forth in article 14."

GLONASS system[13] from interference. However, it states that the Swedish radar systems are of limited scope and would not be adversely affected by MSS, and that discussions have taken place between the United States and the Russian Federation regarding moving GLONASS to other bands. Thus, LQSS asserts that RR731E is unnecessary. Alternatively, LQSS proposes that the last sentence of RR731E, which deals with interference protection for aeronautical systems, be deleted.

12. In its response, AMSC supports LQSS's proposal to modify RR731E. TRW states that the footnote should be interpreted simply to require coordination when the applicable EIRP values are exceeded.

13. We note that RR731E was one of the bases for the international agreement on the use of the 1.6 GHz band for the implementation of new mobile-satellite services.[14] Although LQSS may be correct with respect to its arguments regarding the Swedish radar systems and the Russian Federation GLONASS system, other international concerns remain. Therefore, we believe that the proper forum for modifying this footnote is WRC-95.[15] However, consistent with our interpretation of RR753F, we clarify that the EIRP values may be exceeded with the consent of all affected administrations in these bands.

14. *Frequency Bands for Feeder Links.* LQSS requests that we identify specific frequency bands below 15 GHz for MSS feeder link operations. LQSS states that in their license applications, Ellipsat and Constellation, as well as LQSS, urged that we make available the 5150-5250 MHz (5 GHz) band for feeder links. LQSS states that the *R&O* fails to evaluate the need for feeder links or to assess the suitability of various FSS bands for such use. It further states that the 27.5-30 GHz FSS band, which we have stated may satisfy uplink feeder link requirements,[16] is unlikely to do so because the band will be crowded with other users. LQSS concludes that we should identify specific bands below 15 GHz that can be used for feeder links. TRW concurs with this assessment.[17]

15. In the *R&O*, we noted that there may be difficulties in using for feeder links bands that are congested with GSO FSS systems, and that LEO MSS feeder links would need to operate in bands that are not heavily used by such systems. We stated that we would be exploring all options to ensure that adequate unencumbered spectrum is available for feeder link requirements. In a recent *Report* to NTIA, we recommended that the shared Government/non-Government bands at 3600-3700 and 5850-5925 MHz be made available for exclusive non-Government use.[18] We noted that the 3600-3700 MHz band was identified in our negotiated rule making[19] regarding MSS above 1 GHz as one of the more likely candidates for MSS/RDSS feeder link spectrum.[20] We intend to explore with NTIA the possibility of feeder link spectrum being made available from these and other existing Government or shared Government/non-Government bands that may be reallocated for exclusive non-Government use.

ORDERING CLAUSE

16. Accordingly, IT IS ORDERED, that the Petition for Clarification and Partial Reconsideration submitted by Loral Qualcomm Satellite Services, Inc. IS GRANTED to the extent indicated herein, and IS DENIED in all other respects. This action is taken pursuant to Sections 4(i), 303 (c), (f), (g), and (r), and 309(a) of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154(i), 303(c), (f), (g), and (r).

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

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[13] GLONASS is a satellite system that is under consideration for use with the U.S. Global Position Satellite (GPS) for development of a Global Navigation Satellite System (GNSS).

[14] *See Final Acts WARC-92.* We note however that the United States took a reservation to the WARC-92 MSS decisions. The U.S. stated: "In the view of the United States of America, this Conference has unduly delayed the availability of sufficient spectrum for the mobile-satellite service in the range 1-3 GHz on an international and regional basis. Therefore, the United States of America reserves its right to take any necessary steps to meet the needs of the mobile-satellite service in this band". The U.S. has indicated that it plans to seek clarification of the language of RR731E at WRC-95. *See Second Notice of Inquiry*, IC Docket No. 94-31, adopted January 30, 1995 and released January 31, 1995.

[15] As previously discussed, LQSS is participating in our WRC-95 proceeding, and has provided comments on modifying RR731E.

[16] *See Second Notice of Proposed Rule Making*, CC Docket No. 92-297, 9 FCC Rcd 1394 (1994), at para. 22.

[17] The various proponents are split as to whether they prefer spectrum below 15 GHz (Constellation, Ellipsat, and Loral) or whether they prefer feeder link spectrum in the 27.0-29.5 GHz band (Motorola and TRW). This consideration is a function of their respective system designs. The feeder link issues also are being considered by the Commission in preparing to recommend U.S. positions for the WRC-95. *See Second Notice of Inquiry*, IC Docket No. 94-31, FCC 95-36, released January 31, 1995.

[18] *See Report from the Federal Communications Commission to Ronald H. Brown Secretary, U.S. Department of Commerce Regarding the Preliminary Spectrum Reallocation Report*, FCC 94-213, released August 9, 1994, at paras. 66 and 69. We are placing a copy of this *Report* into ET Docket No.,92-28. Although the Federal Aviation Administration (FAA) has proposed to implement new aircraft navigational aids in the 5 GHz band, we note that ITU Task groups 4/5 and 8/3 are attempting to further evaluate the 5 GHz band for possible use by MSS feeder links and to identify further available frequencies that might accommodate existing or future MSS feeder link operations.

[19] *See Report of the MSS Above 1 GHz Negotiated Rulemaking Committee*, released April 6, 1993.

[20] *Id.*, at para. 66.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

MCCOOK CENTRAL SCHOOLL DISTRICT #43-7
Montrose, South Dakota — File No. BPLIF-920402DG

SIOUX FALLS CATHOLIC SCHOOLS
Harrisburg, South Dakota — File No. BPLIF-920825DC

For Construction Permit and License
in the Instructional
Television Fixed Service on
Channels G1, G2, G3, and G4.

MEMORANDUM OPINION AND ORDER

Adopted: March 9, 1995; Released: March 20, 1995

By the Commission:

1. The Commission has before it for consideration the above-captioned mutually exclusive applications of McCook Central School District #43-7 (McCook) and Sioux Falls Catholic Schools (Sioux Falls), each seeking a construction permit and license in the Instructional Television Fixed Service (ITFS) on Channels G1-G4 in the areas of Montrose and Harrisburg, South Dakota, respectively.

BASIC ELIGIBILITY

2. Before applying the mutually exclusive selection procedure to determine the number of merit points to be awarded to each applicant, we must first ascertain the basic eligibility of the applicants. Educational institutions and governmental organizations that propose to serve either their own enrolled students or students at accredited schools within their respective jurisdictions establish their eligibility by accreditation from the appropriate state department of education or a recognized regional or national accrediting organization. Other ITFS applicants that propose to serve students at accredited schools outside of their respective jurisdictions must, to be eligible, submit letters of intended use from those schools and establish local program committees in those communities. See 47 C.F.R. Section 74.932(a)(1)-(5). Both applicants are qualified to be ITFS licensees. McCook is a school district that is accredited by the South Dakota State Board of Education and that proposes to serve the formal educational needs of students enrolled in schools both within and outside its jurisdiction. Sioux Falls is a school system that is likewise accredited by the South Dakota State Board of Education and that proposes to provide formal educational programming to schools within its jurisdiction.

MUTUALLY EXCLUSIVE SELECTION PROCEDURE

3. In cases of mutually exclusive ITFS applications, where applicants are competing for the same or adjacent channels in the same geographic area, each application is reviewed pursuant to our comparative process. This procedure awards a maximum of twelve merit points based on five criteria deemed to be most relevant to predicting the applicant best qualified to provide the service for which the ITFS spectrum has been allocated. *Instructional Television Fixed Service - Second Report and Order in MM Docket No. 83-523 (Second Report and Order)*, 101 FCC 2d 49, 65-72 (1985); 47 C.F.R. Section 74.913. First, four points are awarded to local applicants.[1] Second, three points are awarded to applicants which are accredited schools, educational institutions or school boards and school districts applying within their jurisdictions. Third, two points are awarded to applicants whose requests would result in the acquisition by these applicants of four or fewer ITFS channels within the particular area. Fourth, either one or two points may be awarded to applicants for specified levels of proposed ITFS programming.[2] Fifth, one point is awarded to applicants which are existing E or F channel licensees seeking to relocate on another ITFS channel group, where such applicants show an established need for an expanded service that cannot beaccommodated on their grandfathered E or F facilities. The tentative selectee is the applicant with the highest score.

4. Under this comparative selection process, the applicants are awarded points based on the following criteria:

Localism. Each applicant is entitled to four points under this criterion. McCook is a school district and Sioux Falls a school system that propose to serve the formal educational needs of students enrolled at schools within their jurisdictions.

Accreditation. Each applicant, accredited by the South Dakota State Board of Education, is entitled to three points for accreditation.

Four-Channel Limitation. Neither applicant is the licensee of, or has filed applications for, additional ITFS channels in its proposed service area. Consequently, each applicant is entitled to two points for remaining within the four-channel limitation.

Instructional Programming. ITFS applicants detail their formal educational and other ITFS programming proposals in both a programming schedule and a program "grid".

[1] A "local" applicant is an institution or organization that is physically located in the community or metropolitan area where service is proposed. *Second Report and Order*, 101 FCC 2d at 59; 47 C.F.R. Section 74.932, Note 1.

[2] One point is awarded for a proposed weekly schedule of at least 21 average hours per channel of formal educational programming or of at least 41 average hours per channel of other ITFS programming. Two points are awarded for a proposed weekly schedule of at least 41 average hours per channel of formal educational programming or at least 61 hours per channel of ITFS programming where at least 21 of those hours are formal educational programming. 47 C.F.R. Section 74.913(b)(4).

McCook's illustrative schedule and program grid propose an average of 24.375 hours of formal ITFS programming per channel per week. Therefore, McCook is entitled to one program merit point. In contrast, Sioux Falls' illustrative schedule and grid propose an average of 42 hours of ITFS programming per channel per week, all of which is designated as formal educational programming. Therefore, Sioux Falls is entitled to two programming merit points.

E- and F- Channel Group Relocation. Neither applicant is the current licensee of an E or F channel seeking to relocate to other channels. Consequently, no applicant is entitled to the one point for such applicants.

Total. McCook is entitled to four points for being local, three points for being accredited, two points for observing the four-channel limitation, and one point for proposing at least 21 hours of formal educational programming per channel per week, for a total of ten points. Sioux Falls is entitled to four points for being local, three points for being accredited, two points for observing the four-channel limitation, and two points for proposing at least 41 hours of formal educational programming per channel per week, for a total of eleven points. Thus, Sioux Falls is the tentative selectee.

OTHER MATTERS

5. Sioux Falls proposes to lease its excess capacity for non-ITFS use as permitted by 47 C.F.R. Section 74.931. Sioux Falls has submitted a copy of its lease with Family Entertainment Network, Inc., which conforms in all respects with our requirements.

6. No petitions to deny or informal objections have been filed against Sioux Falls' application, and we find Sioux Falls fully qualified to be an ITFS licensee. We also conclude that grant of Sioux Falls' application would serve the public interest, convenience and necessity.

7. Accordingly, IT IS ORDERED, That the application of McCook Central School District #43-7 (BPLIF-920402DG) IS DENIED, and the application of Sioux Falls Catholic Schools (BPLIF-920825DC) IS GRANTED.

8. IT IS FURTHER ORDERED, That the staff of the Mass Media Bureau shall send copies of this decision to the applicants by certified mail, return receipt requested.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 94-20

In re Application of

FAMILY BROADCASTING, INC. File No. BPH-910924MB

For Construction Permit for a
New FM Station on Channel 229A in
Hague, New York

Appearances

Joseph E. Dunne, III, Esq. on behalf of Family Broadcasting, Inc. and *Robert A. Zauner*, Esq. on behalf of the Mass Media Bureau.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE JOHN M. FRYSIAK

Issued: March 14, 1995; Released: March 21, 1995

PRELIMINARY STATEMENT

1. This proceeding involves the application of Family Broadcasting, Inc. ("Family") for a new FM station on channel 229A in Hague, New York which was filed on September 24, 1991. By *Hearing Designation Order* (*"HDO"*), DA 94-215 (released March 23, 1994), Family's application was designated for hearing on the following issues:

> a) Whether the applicant, at the time it so certified, had reasonable assurance that its proposed site would be available to it;
>
> b) Whether, in light of the evidence adduced pursuant to the foregoing issue, the applicant misrepresented to the Commission the availability of its specified site; and
>
> c) If, b) above is resolved in the affirmative, the effect thereof on the applicant's qualifications to be a Commission licensee.

2. The *HDO* further specified that grant of a permit to Family shall be subject to the following condition:

> The permittee/licensee, in coordination with other users of the site, must reduce power or cease operations as necessary to protect persons having access to the site, tower or antenna from radio frequency radiation in excess of FCC guidelines.

3. On November 1, 1994, Family filed a Petition for Leave to Amend its application to specify a new antenna site. The proposed new antenna site is the same site Family specified in an amendment filed with the Commission on January 27, 1992. Family's 1992 amendment was rejected in the *HDO* because it was not accompanied by a "good cause" showing. At the hearing, because the good cause determination was contingent upon the resolution of the above-specified issues, the Presiding Judge directed that comments on Family's November 1, 1994, amendment be included in the Mass Media Bureau's ("Bureau") proposed findings of fact and conclusions of law (Tr. 12-13).

4. A prehearing conference in this proceeding was held on May 24, 1994. A hearing session was held on November 2, 1994. By *Order*, FCC 94M-612, released November 9, 1994, the record in this proceeding was closed. Proposed findings were filed on January 31, 1995 and Family's Reply was filed on February 15, 1995.

FINDINGS OF FACT

5. Family is the licensee of WGLY-FM, Waterbury, Vermont; WGLV-FM, Hartford, Vermont; and, low power television station W39AS, Burlington, Vermont (Family Ex. 1, p. 1). Family is also the permittee of WMNV-FM, Rupert, Vermont. Alex D. McEwing is the president and 39.8 percent shareholder of Family, and is also the president and a director of Christian Ministries, Inc., a nonprofit nonstock organization which is the permittee of a noncommercial FM station in Bolton, Vermont (BPED-931103MA)[1] and which has applied for a noncommercial FM station in Barre, Vermont (BPED-930311MA). Mr. McEwing has been the largest stockholder and the president of Family since February 12, 1986 (*Id.*).

6. McEwing was responsible for preparing and reviewing Family's application for Hague. Family wanted to utilize the Hague facility as a repeater station, repeating the programming on Family's FM station, WGLY. In looking for an antenna site for Family's proposed facility, McEwing determined that the best location would be an existing tower on Mt. Defiance. He felt that of the sites available, the Mt. Defiance site would provide the best coverage of Hague, and, as an existing site, would enable Family to expedite service to the public (*Id.;* Tr. 34-5; 57).

7. McEwing called David Gallety, the executive director of WAMC, an FM station which operates on the Mt. Defiance site, to ascertain who owned the tower. McEwing had met Gallety previously when both were involved in a proceeding for a new station in Voorheesville, New York. Gallety told him that the tower was owned by the Fort Ticonderoga Association and that McEwing should contact Nick Westbrook at the Association. Gallety provided McEwing with Westbrook's telephone number. During the conversation, McEwing asked Gallety if there was space on the tower for another antenna. Gallety told him space on the tower was tight, but he thought there could be space available (Tr. 35-8).

8. McEwing called Westbrook and introduced himself as a representative of Family (Family Ex. 1, Att. A, p. 2), and said that Dave Gallety had given him Westbrook's name (Tr. 40). McEwing also told Westbrook that he was under

[1] Since the closing of the record in this proceeding, Christian Ministries, Inc.'s application for Bolton has been granted.

some pressure to get an application for Hague on file because the allocation was vacant and the application was being filed on a "first come-first served" basis (Family Ex. 1, Att. A, p. 2). McEwing told Westbrook that he wanted to check to see if the Mt. Defiance site was available for an FM application for Hague, New York. Westbrook responded that he needed a "formal proposal," including the applicant's tax status, which McEwing discussed with him (Family Ex. 1, Att. A, p. 2; Tr. 42). In addition, Westbrook noted that the proposal should include a reference to the amount of rent that Family proposed paying, the time frame during which the station would be built, how much room Family would require in the building, and approximately how much electricity the station would use. McEwing's notes of the conversation include a notation concerning "tenant 1 percent of gross" (Family Ex. 1, Att. A, p. 5), which referred to a comment made by Westbrook concerning the rent paid by one of the other users of the site (Family 1, Att. A, p. 4; Tr.51). The notes also include the notation, "Okay," Family Ex. 1, Att. A, p. 5, which refers to McEwing's reaction to Westbrook's request for a written proposal (Tr. 43). McEwing told Westbrook that he would "make it worth his while." (Tr. 52).

9. McEwing then explained that the FCC process took a long time, and that Family would not likely need to use the site for many months, but that Family was under time constraints to file its application quickly (Family Ex. 1, Att. A, pp. 4-5). McEwing explained that the FCC required that an applicant have "reasonable assurance" of the availability of its antenna site, which meant that the site was available and that he (Westbrook) would rent the site to Family. McEwing told Westbrook that they did not need to agree on a specific monthly rental, that the specific details could be negotiated later if he were willing to rent the site to Family. McEwing knew what "reasonable assurance" meant because he had spoken to his communications counsel, Mr. Dunne, concerning the matter (Family Ex. 1, p. 2), prior to his conversation with Westbrook (Tr. 33). McEwing understood that Family didn't need to have negotiated the terms and conditions of a lease to have reasonable assurance of a site, but that Family, at least, had to have the permission of the site owner to specify the site in an application. In Mr. McEwing's mind "reasonable assurance" meant "one that the site was available and secondly that the site was available to rent for me." (Tr. 33, 34). McEwing's understanding of what "reasonable assurance" meant was confirmed in writing by counsel (Family Ex. 1, Att. B, p. 2). In that letter counsel stated:

> *Section VII, Q. 3.* Please review the information on the site certification carefully to determine if it is completely accurate. Recall that the Commission requires no more (but no less) than that Family has reasonable assurance to use the site specified in the application. Reasonable assurance means, at a minimum, permission to use the site. The permission may be given orally--it need not be in writing--but it must be unambiguously given.

(Family Ex. 1, Tab B).

10. Because he was in a hurry to get the application on file, McEwing asked Westbrook if he (Westbrook) had any objections to Family filing an application on the Mt. Defiance site (Family Ex. 1, Att. A, p. 3; Tr. 41, 44, 47, 53). Westbrook replied that he had a board meeting coming up soon, and that Family would need to "send him a letter." (Family Ex. 1, Att. A, p. 2; Tr. 44, 46). McEwing agreed to send the requested letter (Family Ex. 1, Att. A, p. 2). McEwing alleges that when the conversation with Westbrook ended, he believed that Westbrook would not object to Family specifying the Mt. Defiance site in its application and that he had to prepare a formal written proposal for Westbrook to commence the negotiating process.

11. On this point the transcript contained the following testimony:

> MR. ZAUNER:
>
> Q Did you directly ask Mr. Westbrook whether Family had permission to use the Mt. Defiance site?
>
> A I asked Mr. Westbrook if he had any objections to us specifying the Mt. Defiance site in our application. And
>
> Q what did he tell you?
>
> A He said send me a letter.
>
> Q So he didn't say yes or he didn't say no, he just said send you -- send me a letter.
>
> A That's correct.

(Tr. 43-44).

12. After his conversation with Nicholas Westbrook on September 18, 1991, McEwing immediately called Gary Savoie, a consulting engineer, and asked him to prepare the application for channel 229A in Hague (Family Ex. 1, p. 2). McEwing's telephone records show that the call took place immediately after the conversation with Mr. Westbrook, and that the conversation took over 32 minutes (Family Ex. 1, Att. A, p. 7; Family Ex. 3, p. 1).

13. McEwing told Savoie that there was some urgency in the matter because the window for filing for the allocation had closed and the application would be a "first-come, first-served" application (Family Ex. 1, p. 2; Ex. 3, p. 1). McEwing instructed Savoie to specify the Mt. Defiance site of WANC-FM, and gave him some technical information about the site. Savoie specifically asked McEwing if Family had gotten permission to use the site (Family Ex. 1, p. 2; Ex. 3, p. 1). Savoie asked McEwing something like: "have you got the site?" McEwing told him "yes," that he had just spoken with Nicholas Westbrook and had asked him if we could use the site in Family's application, and that Westbrook had expressed no objection, but requested a formal proposal, in writing, to present to his board of directors. Savoie's notes of the conversation show that he noted Mr. Westbrook's name and telephone number as the person who gave Family permission to use the site (Family Ex. 3, p. 2).

14. In preparing the application Savoie became concerned about several technical issues, such as the electromagnetic radiation at the site and the spot, exactly, where Family's antenna could be located on the WANC tower (Family Ex.3, p. 3). Savoie called the other occupant on the tower which Family was specifying, FM station WANC, and told the person at WANC that he (Savoie) was preparing an application on behalf of Family Broadcasting, Inc. for an FM frequency in Hague, New York, that Family was specifying the WANC tower as its site, and that he needed some technical information to prepare the FCC application (Family Ex. 3, p. 3). Savoie's notes of his conversation with one he referred to as the WANC en-

gineer indicated that the WANC engineer told him that he knew that McEwing had already called about the site, and that he had been instructed to be as accommodating as possible. He was, and following that conversation Savoie had no doubt that Family had permission to use the site (*Id.*).

15. McEwing never sent Westbrook the written proposal that Westbrook had requested. After speaking with Westbrook, McEwing became involved in other, unrelated matters. When McEwing focused attention again on Family's Hague application, it was time to publish the public notice of its filing. On Monday, November 11, 1991, Family ran the public notice in the *Times of Ti*. Family's notice stated, inter *alia*, that, "[t]he antenna and transmitter will be located at the top of Mount Defiance." (Tr. 48-49; MMB Ex. 1, Att. 1).

16. By letter dated November 14, 1991, Westbrook informed McEwing that he was "greatly disturbed to read the legal notice in the *Times of Ti* ... declaring your intention to seek approval from the FCC for an FM broadcast facility based on Mount Defiance." Westbrook further stated that, "[n]either you, nor Family broadcasting, nor Harvest Broadcasting, nor any other related entity have approval to do so from the property owners, the Fort Ticonderoga Association." In addition, Westbrook noted:

> When you telephoned in early September to inquire about lease possibilities during this current FCC 'window,' I stated clearly that we would consider written proposals only, detailing technical and financial implications. I noted that we had an upcoming Board of Trustees meeting in early October. Your only subsequent communication was the legal notice referred to above.

(Family Ex. 7).

17. When McEwing received Westbrook's letter, he tried to call Westbrook but could not reach him. McEwing then wrote a letter, dated November 18, 1991, and faxed it to Westbrook. In his letter McEwing stated in pertinent part:

> I specifically told you on the phone when I talked with you, that the FCC is a long process and that if you had no objections we would be filing an application for Hague, NY with a proposed transmitter on Mt. Defiant (sic) obviously pending your formal approval. We have a written option on another transmitter site to use for this proposed facility. But, it was my impression from you that your organization might have some interest in leasing space for the right price and terms - by legal definition of reasonable assurance' - that impression is all that is necessary to file an FCC application - it gets the long process rolling.
>
> Our intention was to file the application based on our impression that there was tower rental opportunity available, and then formally submit the letter your requested.

(Family Ex. 1, Tab A, Att. C).

18. Immediately after receiving Westbrook's letter, McEwing called Peter Morton, another consulting engineer with whom he was acquainted, to ask his help in finding a new site and preparing the engineering portions of an amendment to the Hague application (Family Ex. 1, p. 3). McEwing told Morton that Westbrook had originally indicated to McEwing that he (Westbrook) had no objections to specifying the site and that he "had pulled the rug out from under us." Morton told McEwing that he was puzzled that Westbrook had changed his mind, since Morton had asked him (Westbrook) if Mr. Morton could use the Mt. Defiance site during the summer and had been told exactly the same thing, and Morton believed that Westbrook had agreed for him to use the site too (Family Ex. 1, p. 4).

19. During the Summer of 1991, Morton worked as the manager of WIPS, an AM daytime station serving Ticonderoga, New York. The WIPS transmitter site is located on property owned by the Fort Ticonderoga Association. Morton became interested in the possible purchase of WIPS (Tr. 65). At that time Morton was aware that the FCC was in the midst of a rulemaking procedure to allocate a class A FM channel to Hague, New York, a town adjacent to Ticonderoga, and Morton did an allocation study which showed that the Mt. Defiance site owned by the Fort Ticonderoga Association would be by far the best site to provide service to Hague. Morton was interested in operating an AM-FM combination (Tr. 65). Morton approached Westbrook about the availability of the site for an additional transmitter and antenna for the proposed FM station (Family Ex. 2, p. 2). Westbrook told Morton his proposed lease terms. Morton neither agreed or disagreed with Westbrook's proposal (Family Ex. 2, p. 2), but he believed that he had reasonable assurance to use the Mt. Defiance site after that meeting (Tr. 78, 80). When the FCC subsequently set a date to accept applications Morton again contacted Westbrook and asked Westbrook about the availability of the Mt. Defiance site. Westbrook asked Morton if it were possible to use the AM tower site, which is located next to the lake in Ticonderoga, but Morton rejected the AM site as technically inadequate. Westbrook then agreed that the Mt. Defiance site was probably the best place, and told Morton something like "we can probably do something," or "it can be worked out" (Family Ex. 2, p. 2; Tr. 77), or, "if you have to use the FM, that's what we'll have to do. ..." (Tr. 73). Westbrook also asked Morton for a letter to take to his board of directors outlining possible programming for the new station and the technical requirements (size and shape) of the transmitter and antenna (Family Ex. 2, p. 2-3).

20. In his declaration (MMB Ex. 1) dated October 28, 1994, Westbrook states that he recalls meeting Morton in his office in the summer of 1991. At the time Morton was the new manager of WIPS-AM, Ticonderoga, New York. WIPS-AM uses a broadcast tower on property owned by the Association located near the shore of Lake Champlain about one mile from Mt. Defiance.

21. According to Westbrook during that discussion, Morton noted the troubled financial situation of WIPS-AM's owners, Empire State Radio. Morton informed him that he might have an opportunity to acquire WIPS-AM at a very favorable price. He inquired about the Association's potential interest in a transfer of the lease to him and his potential associates and asked about the general financial requirements (MMB Ex. 1, ¶16).

22. Westbrook stated that he emphasized the community's strong desire to keep the station from going silent, recognizing that the community would lose forever a tremendous asset. He discussed a potential rental fee framework, including both a fixed amount and a percentage of gross. Westbrook noted that the Association owned only

the tower by the lake and that Morton would have to negotiate separately from the studio building located in the village of Ticonderoga (MMB Ex. 1, ¶17 , ¶18).

23. Westbrook avers that the conversation with Morton was hypothetical on both sides. He understood Morton to be seeking an opportunity to own his own station, but he needed a business plan and financial backers. Westbrook invited him to return when he had a firm written proposal. In his opinion, he never gave Morton "reasonable assurance" of anything during their conversation. He did not discuss with Morton the Association's completely separate broadcast facilities on Mt. Defiance (MMB Ex. 1, ¶19).

24. Westbrook does not recall McEwing at any point asking whether Family could specify Mt. Defiance as its antenna site. Westbrook avers that had McEwing done so, his answer would have been no. Westbrook states that without first obtaining the approval of the board of trustees and the other tenants, he could not unilaterally approve the specification by Family of the site. When no written proposal was received from McEwing by the date of the October board meeting, he presumed the matter was dead. In the absence of a written proposal by Family, the matter was not raised at the October meeting (MMB Ex. 1, ¶ 7).

25. In his opinion had Family submitted a formal written request for use of the Mt. Defiance tower the Board of Trustees would have been open to considering the proposition (MMB Ex. 1, ¶13).

CONCLUSIONS OF LAW

Site Availability

26. The Commission has long held that to claim "reasonable assurance" of the availability of its site, an applicant must have received an indication that the owner of the site or his agent will be favorably disposed toward entering into an arrangement with the applicant. *See, Elijah Broadcasting Corporation,* 5 FCC Rcd 5350, 5351 (1990). It is well established that, although a legally binding commitment to provide access to a site is not required, a "mere possibility" that a site will be available also does not suffice. *See, El Camino Broadcasting Corp.* 12 FCC 2d 25, 26 (Rev. Bd 1968). Even in circumstances where a landowner has agreed "to discuss" making his land available to an applicant, "reasonable assurance" of the availability has been found not to exist (*Id.*). Indeed, as the Review Board stated:

> In our view, the mere fact that the property owner has indicated that he would discuss the possibility of [making land available] at some future date does not, absent some indication that he is favorably disposed toward making such an arrangement, provide any more assurance than an unrejected offer.

(*Id.*). *See also, William F. and Anne K. Wallace,* 49 FCC 2d 1424. 1427 (Rev. Bd. 1974), statement by landowner that he sees "no problem" in applicant locating on his land does not constitute "reasonable assurance" of the availability of the proposed site. *See, Progressive Communications, Inc.,* 61 RR 2d 560 (Rev. Bd. 1986).

27. A careful review of the record discloses that Family did not possess the requisite reasonable assurance of the availability of its proposed antenna site at the time it filed its application. McEwing avers that he specifically asked Westbrook if he had any objection to Family specifying the Mt. Defiance site in its application as its proposed antenna site. At this point the record shows that Westbrook was aware of Family's time restraints regarding the filing of the application and that there was a degree of urgency. McEwing did not answer in the affirmative. Rather, Westbrook replied that he needed a formal written proposal that would include Family's tax status, the rent Family would be willing to pay, the time frame involved, the amount of electricity required and the amount of space in the transmitter room that Family would need.

28. There was no ambiguity in Westbrook's response. Indeed the clear meaning of his response was underscored by Westbrook when he learned that Family had claimed in its application that it had available access to the Mt. Defiance site. Westbrook disabused Family of that idea by letter and also so informed the Commission.

29. Family argues that, Westbrook's response that Family should send a letter notwithstanding, McEwing was correct in understanding that Westbrook was amenable to grant Family access to the Mt. Defiance site. McEwing indicates that in following up on his conversation with Westbrook he engaged an engineer to do the technical makeup who in turn talked to the engineer of one of the occupants of the Mt. Defiance tower and was told that he had already known that McEwing called about the site and that he had been instructed to be as accommodating as possible. However, this information is of no weight. It is not probative of the assertion that Westbrook was amenable to grant Family access. It is speculative.

30. Family also argues that Westbrook reacted to his request in the same manner as he had to Peter Morton who also on a different occasion sought access to the Mt. Defiance site and that at that time Morton believed he had access available to the Mt. Defiance site and transmitter. But, Morton's claim of access is also speculative because Morton's attempt to gain access never came to a finality. Furthermore, Morton's claim is rebutted by Westbrook in his declaration (MMB Ex. 1). The record is barren of any evidence as to why Westbrook would not state the truth.

31. It is concluded that McEwing never obtained reasonable assurance that Family's proposed antenna site on Mt. Defiance would be available for Family's use. McEwing's belief to the contrary cannot be translated to an expressed willingness to grant access on Westbrook's part. At best all Family had was a mere possibility that the Mt. Defiance site would be available which by Commission precedent does not constitute "reasonable assurance."

MISREPRESENTATION

32. It is well established that misrepresentation requires a false statement of fact made with an intent to deceive. *Fox River Broadcasting, Inc.,* 93 FCC 2d 127, 129 (1983).

33. At the time McEwing spoke with Westbrook he was in a rush to obtain a site for Family's Hague application. He inferred from Westbrook's failure to enunciate an objection to his request for permission to specify Mt. Defiance that Family had Westbrook's permission to do so. Based on his understanding of reasonable assurance, McEwing believed that Family could specify the site because it was available and because Westbrook had approved of its specification. The fact that Westbrook wanted Family to submit a formal written proposal further established in McEwing's mind that Westbrook had authorized Family's use of the site. McEwing apparently considered the formal written proposal necessary only to determine the terms.

McEwing's failure to submit a proposal is consistent with this testimony that he believed he had obtained permission to specify the site from Westbrook during their telephone conversation.

34. Moreover, McEwing's claim that he believed that he had obtained reasonable assurance from Westbrook is supported by other record evidence. McEwing knew that Family would have to prepare and publish public notice of its selection of the Mt. Defiance site in a local newspaper and that Westbrook and the Fort Ticonderoga Association would then become aware of Family's site intentions. To deliberately specify an unavailable site, knowing that your deception would be made known to those who knew the true facts, would not make sense. Also, McEwing, before calling Westbrook, consulted with his attorney to ascertain what constituted reasonable assurance. This evidences an intent to comply with the Commission's requirements with regard to Family's site specification. Finally, McEwing's November 18, 1991, letter to Westbrook, written when he first learned of Westbrook's opposition to Family's specification of the Mt. Defiance site, is consistent with McEwing's testimony in this proceeding that he believed that he had reasonable assurance to specify the Mt. Defiance site based on the absence of an objection by Westbrook. The misrepresentation issue IS RESOLVED in Family's favor.

Family's November 1, 1994, Amendment

35. Currently, Family is without an antenna site. On November 1, 1994, Family filed a Petition for Leave to Amend its application to specify a new antenna site. The antenna site specified is the same antenna site Family specified in its January 22, 1992, amendment which was rejected in the *HDO* for failure to meet the good cause requirements of Section 73.3522(b)(1) of the Commission's Rules. The Bureau correctly states that there is no need to examine Family's good cause showing. Its amendment must be rejected in any case. The law is clear that "an applicant will not be permitted to amend [to a new transmitter site] where it did not have the requisite reasonable assurance to begin with. ..." *Rem Malloy Broadcasting*, 6 FCC Rcd 5843 (Rev. Bd. 1991), citing *South Florida Broadcasting Co.*, 99 FCC 2d 840, 845 n.12 (Rev. Bd. 1984). Here, it has been concluded that Family never obtained reasonable assurance of the availability of its original antenna site. Consequently, Family cannot now be permitted to amend its application to specify a new site. Family's November 1, 1994 Petition for Leave to Amend IS DENIED.

ULTIMATE CONCLUSIONS

36. From the foregoing, it is concluded that Family never obtained reasonable assurance of the availability of the Mt. Defiance antenna site specified in its application. It is also concluded that in specifying the Mt. Defiance site, Family did not intend to deceive the Commission as to the site's availability. Finally, it is concluded that because Family never obtained reasonable assurance of the availability of the antenna site specified in its application, it cannot now be permitted to amend its application to specify a new site.

Accordingly, IT IS ORDERED that unless an appeal from this Initial Decision is taken by a party, or the Commission reviews the decision on its own motion in accordance with Section 1.276 of the Rules, the application of Family Broadcasting, Inc. (File No. BPH-910924MB) for a construction permit for a new FM station to serve Hague, New York, is deficient and IS DENIED.[2]

FEDERAL COMMUNICATIONS COMMISSION

John M. Frysiak
Administrative Law Judge

[2] In the event exceptions are not filed within 30 days after the release of this Initial Decision and the Commission does not review the case on its own motion, this Initial Decision shall become effective 50 days after its public release pursuant to Rule 1.276(d).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 94-88

In re Applications of

COMMUNITY EDUCATIONAL ASSOCIATION
Holly Hill, Florida

File No. BPED-930316MF

For a Construction Permit for a New Noncommercial Educational FM Station on Channel 212A

Appearances

Scott C. Cinnamon, on behalf of Community Educational Association; and *Robert A. Zauner,* on behalf of the Chief, Mass Media Bureau.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE JOSEPH CHACHKIN

Issued: March 14, 1995; Released: March 20, 1995

PRELIMINARY STATEMENT

1. By *Hearing Designation Order,* DA 94-789, released August 2, 1994 (the HDO), the Chief, Audio Services Division set this proceeding for hearing. At the time, CEA's application was mutually exclusive with the application of Cornerstone Community Radio, Inc. (CCR). In addition to the standard non-commercial comparative issues, the HDO specified the following two issues against CEA:

> To determine whether CEA is a qualified educational organization proposing an acceptable educational format in compliance with 47 C.F.R. § 73.503(a) of the Commission's Rules.
>
> To determine whether there is a reasonable possibility that the tower height and location proposed by CEA in this proceeding would constitute a hazard to air navigation.

2. On August 30, 1994, CEA filed an engineering amendment intended to resolve the mutual exclusivity between its application and the application of CCR. By *Memorandum Opinion and Order,* FCC 94M-521, released September 13, 1994 (MO&O), the Presiding Judge accepted CEA's amendment, and granted CCR's application. The *MO&O* left CEA in the docketed proceeding as a "singleton" applicant pending resolution of the Section 73.503(a) issue specified against it.[1]

3. A hearing session was held on December 15, 1994. The record was closed on that date. Proposed findings of fact and conclusions of law were filed January 26, 1995.

FINDINGS OF FACT

4. According to CEA's "Organization and Board of Directors Agreement," CEA is an association formed "not for gain or individual profit." Its purpose is to assume its share "of responsibility and the privilege of propagating high quality educational programs (broadcast and otherwise) by all available means and in pursuance of said purpose to promote such purposes; to operate, conduct and engage in any lawful activity including all mediums (sic) of media and broadcasting...." CEA Ex. 1, p. 1.

5. CEA recites in its "Statement of Educational Goal and Purposes..."

> Community Educational Association... is an educational organization committed to promoting and assisting the various charitable, religious and educational organizations in the area. CEA's programming will be used to increase political and social awareness, improve relationships and provide better understanding between different cultural/ethnic groups (with a special emphasis on Hispanic/Anglo relations). Teaming with local community leaders and educators, CEA also plans to keep its community educated and informed [about] issues of local concern. To keep aware of the community's changing needs, CEA will conduct informal ascertainments of local business, religious and political leaders, as well as assess letters and phone calls from our listening audience. CEA Ex. 2, p. 1.

6. CEA plans to present programming that will address the following issues of public concern in the proposed service area:

> *Health Care:* CEA will offer locally produced programs addressing such issues as personal health care, family life, AIDS, teenage pregnancy and drug abuse. These programs will use a call in/interview format.
>
> *Education:* CEA plans to set aside air time for student produced programs dealing with issues that concern them. CEA also plans to develop a "Radio School" which, using written material developed with the aid of local educators, will offer courses in basic skills such as Math, English, Reading Skills, Health and Hygiene. CEA plans to offer educational programming in English and Spanish.
>
> *Family Matters:* Interview, panel discussion and call-in shows will be broadcast dealing with divorce and single parent households and how children of such families cope. CEA will also offer programs on drug and alcohol abuse prevention. Finally, CEA will present programming focusing on Bible studies.

[1] The air hazard issue was summarily resolved in favor of CEA. See *MO&O,* FCC 95M-42, released February 9, 1995

CEA Ex. 3.

7. The following is a description of some of the specific programs CEA intends to produce:

> *The Radio School* will be produced in conjunction with the Holly Hill Public School System and local colleges and universities. CEA intends to use this program to offer for credit courses with local educational institutions if the details can be worked out. The target of the program will be students who did not complete their secondary education. Many of the programs will be offered in Spanish and English.
>
> *The Student Hour* will deal with issues facing youth today. Topics will include violence and drug abuse. The program will be produced by students from various secondary and post secondary schools.
>
> *The Church Hour* will present services of local churches of all denominations. The program will also include panel discussions on religious teachings and philosophies.
>
> *The Health Hour* will be an interview/call in program featuring health professionals.
>
> *Learning New Skills* will feature local businessmen explaining the techniques they used to develop their businesses. Other programs will instruct listeners on how to start their own businesses.
>
> *The News Hour* will be broadcast daily for one hour. It will offer news, sports and weather.
>
> *Community Hotline* will focus on consumer problems.

Other programs offered by CEA will focus on the environment, politics, interviews on important events of the day and the use of the public library. CEA Ex. 6. CEA plans to initially broadcast 12 hours per day, seven days a week for a total of 84 hours per week. CEA Ex. 6.

CONCLUSIONS

8. Section 73.503(a) of the Rules provides that:

> A noncommercial educational FM broadcast station will be licensed only to a nonprofit educational organization and upon showing that the station will be used for the advancement of an educational program.

47 C.F.R. § 73.503(a). The Commission's noncommercial educational FM application processing guidelines state that an applicant may qualify for an authorization in the reserved band as either an educational *institution* or an educational *organization*. *See* Appendix A to *Notice of Inquiry*, Docket 78-164, 53 FR 30842 (1989). *See also Palm Bay Public Radio, Inc.*, 6 FCC Rcd 1772, 1773 (1991). Since CEA is not owned or controlled by an educational institution, it can only qualify for a reserved band license as an educational organization.

9. To qualify as educational organizations, applicants must demonstrate that they "have an educational goal and are committed to the advancement of an educational program." *Palm Bay* at 1773. In evaluating compliance with these standards, emphasis is given to those programs that are instructional (for credit) and general educational (no formal credit). Palm Bay at 1773.

10. The Commission has stated that its basic role:

> in the history and development of public broadcasting has been to insure that spectrum space is available for its use and to broadly classify its program service. It has meant that the Commission has had the appropriately limited role of facilitating the development of the public broadcasting system rather than determining the content of its programming. From the perspective of the Commission, public broadcasting is characterized largely by a negative distinction, *i.e.*, pubic stations are not operated by profit seeking organizations...
>
> This basic regulatory scheme has had several public interest advantages. It has made the service possible and its (sic) has maintained its separate identity. At the same time, it has allowed the system to develop in response to the diverse and proximate needs of the communities within which it operates and not according to a standard Commission mold. Rather than imposing broadcasting, the Commission has allowed those who operate, support, and consume public broadcasting to directly determine the nature of its service, especially its programming.

Public Radio and TV Programming, 87 FCC 2d 716, 732 (1981). Traditionally, the Commission has sought to "avoid all unnecessary intrusion into the programming decisions of licensees, including those of public broadcasters." *Id.* 87 FCC 2d at 730.

11. CEA has demonstrated that it qualifies as an educational organization for purposes of becoming a reserved band FM licensee. CEA is not organized for gain and profit. In addition, it has set forth an acceptable educational goal, and a sufficient plan to advance its educational program. Commission policy and precedent support resolution of the Section 73.503(a) issue in favor of CEA.

Accordingly, IT IS ORDERED, That unless an appeal from this Initial Decision is taken by a party, or it is reviewed by the Commission on its own motion in accordance with Section 1.276 of the Rules,[2] the application of Community Educational Association for a construction permit for a new noncommercial educational FM station on Channel 212A at Holly Hill, Florida, IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Joseph Chachkin
Administrative Law Judge

[2] In the event exceptions are not filed within 30 days after the release of this Initial Decision, and the Commission does not review the case on its own motion, this Initial Decision shall become effective 50 days after its public release pursuant to Section 1.276(d).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 94-15

In the Matter of

Amendment of Section 73.202(b) RM-8411
Table of Allotments,
FM Broadcast Stations.
(Ravenswood and Elizabeth,
West Virginia)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: March 14, 1995; Released: March 21, 1995

By the Chief, Allocations Branch:

1. At the request of MediaCom, Inc. ("petitioner"), licensee of Station WRZZ(FM), Channel 291A, Ravenswood, West Virginia, the Commission has before it the *Notice of Proposed Rule Making*, 9 FCC Rcd 1033 (1994), proposing the reallotment of Channel 291A from Ravenswood to Elizabeth, West Virginia, and the modification of Station WRZZ(FM)'s license accordingly. Petitioner filed comments in support of the proposal reaffirming its intention to apply for the channel, if allotted to Elizabeth. No other comments were received.

2. *Comments.* In support of its proposed reallotment to Elizabeth, petitioner contends that the change of community is necessary because from its present tower location, Station WRZZ(FM) is unable to serve Ravenswood with a city-grade signal. In this regard, petitioner has submitted an engineering exhibit demonstrating that multi-path signal distortion and terrain shielding caused by a winding river valley and hills along the sides of the river adversely affect the city grade signal. Petitioner also maintains that the city grade signal, 70 dBu contour, cannot be improved by relocating the transmitter site closer to Ravenswood because of the minimum distance separation requirement with respect to Station WZZW(FM), Channel 292A, Milton, West Virginia. Finally, petitioner states that the reallotment of Channel 291A from Ravenswood to Elizabeth would provide Elizabeth with its first local broadcast service and would not deprive Ravenswood of its sole local aural transmission service.

3. *Discussion.* As an initial matter, we do not believe that the petitioner's engineering showing regarding the difficulty of placing a city grade signal over Ravenswood justifies the proposed reallotment of the channel. Our terrain profile analysis does reveal that there is a terrain obstruction in the line-of-sight path between the licensed site of Station WRZZ(FM) and Ravenswood. The analysis also reveals that there are no alternate sites available for Channel 291A at Ravenswood that would be fully-spaced to Station WZZW(FM), Channel 292A, Milton, West Virginia, and would also provide an unobstructed signal path to the community. However, our engineering study further concludes that the existing obstruction does not preclude Station WRZZ(FM) from placing a 70 dBu signal over the entire community of Ravenswood.

4. However, we believe that other grounds exist for granting the petitioner's proposal. Specifically, we believe that it is in the public interest to reallot Channel 291A from Ravenswood to Elizabeth, West Virginia, and to modify Station WRZZ(FM)'s license accordingly because this would result in a preferential arrangement of allotments pursuant to the Commission's change of community procedures. *See Modification of FM and TV Authorizations to Specify a New Community of License*, ("*Change of Community R&O*"), 4 FCC Rcd 4870 (1989), *recon. granted in part*, 5 FCC Rcd 7094 (1990) ("*Change of Community MO&O*"). Under those procedures, we compare the existing arrangement of allotments with the proposed arrangement of allotments using our FM allotment priorities.[1]

5. In making this analysis, we note that Elizabeth, a community of 900,[2] would receive a first local aural transmission service, which is priority three. On the other hand, Ravenswood, a community of 4,189, already has a local aural transmission service[3] and, therefore, does not trigger priority three. Rather, it falls under priority four, other public interest factors. Under this priority, retention of Station WRZZ(FM) in Ravenswood would constitute its first local night-time transmission service. In balancing the merits of these proposals, we find that the reallotment to Elizabeth should be made because it triggers the higher allotment priority of a first local transmission service. Moreover, our concern about removal of Ravenswood's only local night-time transmission service is ameliorated by the fact that Ravenswood has at least five full- time reception services[4] and by the fact that a construction permit has been issued for another FM station in Ravenswood.

---

[1] The allotment priorities are: (1) first full-time aural service; (2) second full-time aural service; (3) first local service; and (4) other public interest matters. [Co-equal weight given to priorities (2) and (3)]. *See Revision of FM Assignment Policies and Procedures*, 90 FCC 2d 88 (1982).

[2] Population figures taken from the 1990 U.S. Census.

[3] We recognize that Ravenswood's remaining local transmission service, Station WMOV, is a day-time only AM station. However, for purposes of Section 307(b) comparisons under the FM allotment priorities, this nevertheless constitutes an existing local transmission service. *See Change of Community MO&O*, 5 FCC Rcd at 7097, para. 20.

[4] When the areas and populations of Station WRZZ(FM)'s current and proposed service areas are compared, there would be a net service gain of nearly 10,000 persons by granting the petitioner's proposal (*i.e.*, 46,464 people in the gain area of Elizabeth minus 36,482 people in the loss area of Ravenswood.) Further, all but 86 people in the loss area will continue to receive at least five full-time reception services, and those 86 people would still have four full-time reception services. By way of contrast, a significant portion of the gain area is now receiving less than five full-time reception services *i.e.*, (918 people receive only four full-time reception services, 1,082 people receive only three full-time reception services, and 6,056 people receive only four full-time reception services).

6. An engineering analysis has determined that Channel 291A can be allotted to Elizabeth in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction.[5] Since Elizabeth is located within 320 kilometers (200 miles) of the U.S.-Canadian border, concurrence of the Canadian government has been obtained. Pursuant to the provisions of Section 1.420(i) of the Commission's Rules, we also modify Station WRZZ(FM)'s license to specify operation on Channel 291A at Elizabeth, West Virginia, in lieu of Ravenswood, West Virginia.

7. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **May 4, 1995**, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the communities listed below, to read as follows:

City	Channel No.
Ravenswood, West Virginia	226A
Elizabeth, West Virginia	291A

8. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of MediaCom, Inc., for Station WRZZ(FM) at Ravenswood, West Virginia, IS MODIFIED to specify operation on Channel 291A at Elizabeth, West Virginia, subject to the following conditions:

(a) Nothing contained herein shall be construed as authorizing any change in Station WRZZ(FM)'s license, BMLH-910412KD, except the channel as specified above. Any other changes, except for those so specified under Section 73.1690 of the Rules, require prior authorization pursuant to an application for construction permit (FCC Form 301).

(b) Program tests may be conducted in accordance with the provisions of Section 73.1620 of the Rules, PROVIDED the transmission facilities comply in all respects with license BMLH-910412KD, except for the channel as specified above and a license application (FCC Form 302) is filed within 10 days of commencement of program tests.

9. Pursuant to Commission Rule Section 1.1104(1)(k) and (2)(k), any party seeking a change of community of license of an FM or television allotment or an upgrade of an existing FM allotment, **if the request is granted**, must submit a rule making fee when filing its application to implement the change in community of license and/or upgrade. As a result of this proceeding, MediaCom, Inc., licensee of Station WRZZ(FM) is required to submit a rule making fee in addition to the fee required for the application to effect the change in community of license.

10. IT IS FURTHER ORDERED, That the Secretary shall send a copy of this *Report and Order* by Certified Mail, Return Receipt Requested, to the licensee, as follows:

Don Staats
MediaCom, Inc.
Post Office Box 1346
Parkersburg, West Virginia 26102

11. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

12. For further information concerning this proceeding, contact Sharon P. McDonald, Mass Media Bureau, (202) 418-2180.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[5] The coordinates for Channel 291A at Elizabeth are North Latitude 39-03-48 and West Longitude 81-23-43.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 94-143

In the Matter of

Amendment of Section 73.606(b),
Table of Allotments,
Television Broadcast Stations.
(Albion, Nebraska)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: March 13, 1995; Released: March 21, 1995

By the Chief, Allocations Branch:

1. The Commission has before it the *Notice of Proposed Rule Making* in this proceeding, 9 FCC Rcd 7315 (1994), proposing the allotment of UHF Channel 24 to Albion, Nebraska, in order to permit Citadel Communications Co., Inc.("Citadel Communications") to amend its mutually exclusive application (File No. BPCT-930726KH) for Channel 18 at Albion, to specify operation on Channel 24.[1] Busse Broadcasting Corporation ("Busse Broadcasting") filed comments. Citadel Communications filed comments supporting this proposal and reply comments. For the reasons discussed below, we are allotting UHF Channel 24+ to Albion, Nebraska.

BACKGROUND

2. Citadel Communications is the licensee of television Station KCAN, Channel 8, Albion, Nebraska.[2] In *Albion, Lincoln and Columbus, Nebraska,* 6 FCC Rcd 2876 (1993), *recons. pending,* we substituted UHF Channel 18 for VHF Channel 8 at Albion, allotted VHF Channel 8 to Lincoln, and modified the Citadel Communications Station KCAN license to specify Lincoln as the community of license. That action was specifically conditioned on the pledge of Citadel Communications to file an application for Channel 18 in Albion and operate it as a satellite of Station KCAU, thereby maintaining the availability of ABC network service in Albion.

3. Fant Broadcasting of Nebraska, Inc. filed a competing application for the Channel 18 allotment in Albion proposing a full-service facility (File No. BPCT-931115KF). Because of developments related to our comparative licensing procedures, we are currently unable to designate these applications for a comparative hearing or otherwise resolve these mutually exclusive applications. *See Bechtel v. Federal Communications Commission,* 10 F3d 875 (D.C. Cir. 1993). Accordingly, in order to facilitate resolution of this impasse, we issued the *Notice of Proposed Rule Making* proposing to add Channel 24+ at Albion.

4. In response to the *Notice,* Busse Broadcasting, licensee of Station KOLN-TV, Lincoln, Nebraska, filed comments. In its comments, Busse Broadcasting argues that there is "no demonstrated demand for additional television service" and that an additional television channel to a community of 1,380 persons in a county of 6,607 persons "makes no economic sense." In addition, Busse Broadcasting refers to the Commission's ongoing proceeding to convert its existing NTSC television transmission system to the Digital Television System.[3] *See Advanced Television Systems, First Report and Order,* 5 FCC Rcd 5627 (1990). In view of the anticipated demand for additional television spectrum, Busse Broadcasting argues that a Channel 24+ allotment to Albion would be a "needless squandering of scarce broadcast spectrum."[4] Neither of these arguments is well taken.

DISCUSSION

5. We believe that the public interest would be served by allotting Channel 24+ to Albion, and permitting Citadel Communications to amend its pending application for Channel 18 at Albion to specify operation on Channel 24+ without loss of cut-off protection.[5] This action will resolve the conflict between two mutually exclusive applications and permit the prompt institution of additional television service to Albion as well as facilitate the service gains which prompted our approval of the original Citadel Communications proposal to allot Channel 8 to Lincoln. Busse Broadcasting's argument that the additional allotment of Channel 24+ to Albion makes "no economic sense" raises issues which the Commission has already determined are not relevant in either a licensing or allotment context. *See Policies Regarding Detrimental Effects of Proposed New Broadcast Stations on Existing Stations,* 3

[1] The *Notice* also stated that if any interested party expressed a timely interest in a UHF allotment at Albion, we were prepared to allot Channel 40 to accommodate that interest.

[2] Citadel Communications operates Station KCAN in Albion as a satellite of commonly owned television Station KCAU, Channel 9, Sioux City, Iowa. Station KCAU is an ABC network affiliate.

[3] The Digital Television System is also referred to as Advanced Television Service, ATV, High Definition Television or HDTV.

[4] In its comments, Busse Broadcasting also addresses two aspects of our earlier action reallotting Channel 8 to Lincoln and allotting Channel 18 to Albion. First, Busse Broadcasting contends that the decision to allot Channel 18 to Albion should not have been made in order to enable Citadel Communications to continue its ABC network satellite service. Instead, a decision concerning a Channel 18 allotment should have been made based upon the "traditional allocation criteria" established in *Television Assignments, Sixth Report and Order,* 41 FCC 148 (1952). Second, Busse Broadcasting again argues that additional television service to Lincoln should be achieved by the utilization of one of the two vacant UHF channels allotted to Lincoln. Both of these arguments were considered in *Albion, Lincoln and Columbus, Nebraska, supra,* and are again raised in Petitions for Reconsideration directed against that action. Neither of these arguments is germane with respect to the instant proposal to allot Channel 24+ to Albion, and, therefore, will not be considered in this proceeding.

[5] The reference coordinates for UHF Channel 24+ at Albion, Nebraska, are 41-55-58 and 98-17-23.

FCC Rcd 638 (188), *recon. denied*, 4 FCC Rcd 2276 (1989); *Cheyenne, Wyoming*, 8 FCC Rcd 4473 (1993). Consequently, there is no basis under the current state of Commission precedent for consideration of those issues. In a related context, there is no Commission requirement for Citadel Communications or any other party to demonstrate a "demand" or need for an allotment aside from the already stated willingness of Citadel Communications to apply for the Channel 24+ allotment at Albion and construct the proposed facilities.

6. The allotment of Channel 24+ to Albion will have no adverse impact on a conversion to a Digital Television System. The Commission has recognized that a shortage of broadcast spectrum might exist in major markets if the conversion to the Digital Television System requires more than the 6 mHz currently used by television stations. To meet this concern, the Commission has frozen applications for new stations and requests for new allotments within the minimum co-channel distance of 30 major markets. *See Order, In the Matter of Advanced Television and Their Impact Upon the Existing Television Service, ("Freeze Order")*, 52 Fed. Reg. 28346, published July 29, 1987. The allotment of Channel 24+ to Albion complies with the *Freeze Order* and there is no basis to conclude that this allotment will jeopardize a conversion to a Digital Television System.

7. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **May 4, 1995**, the TV Table of Allotments, Section 73.606(b) of the Commission's Rules, IS AMENDED with respect to the community listed below, as follows:

Community	Channel Nos.
Albion, Nebraska	18,[6] *21+, 24+

8. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

9. For further information concerning this proceeding, contact Robert Hayne, Mass Media Bureau, (202) 776-1654.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Mass Media Bureau

[6] Channel 8 was reallotted from Albion to Lincoln, and Channel 18 was allotted to Albion in *Albion, Lincoln, and Columbus, Nebraska, supra*. In view of the fact that Pappas Telecasting of the Midlands and Busse Broadcasting have filed Petitions for Reconsideration directed to that action, the reallotment of Channel 8 and the allotment of Channel 18 are not final.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: March 21, 1995

CITIZENS UTILITIES COMPANY FILES REVISIONS TO ITS COST ALLOCATION MANUAL PUBLIC COMMENTS INVITED

On February 27, 1995, Citizens Utilities Company (Citizens) filed a revised Cost Allocation Manual (CAM) pursuant to a Common Carrier Bureau (Bureau) Order released December 27, 1994, (DA 94-1499). In that Order the Bureau approved Citizens' CAM subject to several conditions including the submission of further information.

Parties may file comments on the proposed revisions to the CAM no later than **April 19, 1995**. Replies should be filed by **May 4, 1995**. Comments should reference file number AAD 95-36. A copy of each pleading should be sent to Alicia Dunnigan, FCC, Common Carrier Bureau, 2000 L St., N.W., Suite 812, Washington, D.C. 20554, and the International Transcription Service (ITS) 2100 M Street, N.W., Suite 140, Washington, D.C. 20037, (202) 857-3800. Copies are available for public inspection and copying in the Accounting and Audits Division public reference room 2000 L Street, N.W., Suite 812, Washington, D.C. Copies are also available from ITS.

For further information contact Alicia Dunnigan at (202) 418-0810.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: March 21, 1995

BELLSOUTH FILES REVISIONS TO ITS COST ALLOCATION MANUAL TO REFLECT THE PROVISION OF VIDEO DIALTONE SERVICE TO ITS AFFILIATE, BELLSOUTH INTERACTIVE MEDIA SERVICES, INC. (BIMS)
(PUBLIC COMMENT INVITED)

On March 7, 1995, BellSouth Telecommunications, Inc. (BellSouth) filed revisions to its Cost Allocation Manual (CAM) for the separation of regulated and nonregulated costs. These revisions add a new affiliate, BellSouth Interactive Media Services, Inc. (BIMS), a video information provider, which has requested video dialtone service from BellSouth. BellSouth filed these revisions pursuant to a Common Carrier Bureau Order that authorized BellSouth's provision of video dialtone service subject to several conditions, including a requirement that BellSouth file revisions to its CAM to reflect its provision of video dialtone service. *See* BellSouth Telecommunications, Inc., Section 214 Authorization, DA 95-181 (released February 8, 1995).

Parties may file comments on the proposed revisions to BellSouth's CAM no later than **April 19, 1995**. Replies should be filed by **May 4, 1995**. Comments should reference AAD file number AAD 95-37. A copy of each pleading should be sent to Alicia Dunnigan, FCC, Common Carrier Bureau, 2000 L Street, N.W., Room 812, Washington, D.C. 20554 and the International Transcription Service (ITS), 2100 M Street, N.W., Suite 140, Washington, D.C. 20037 (202) 857-3800. Copies are available for public inspection and copying in the Accounting and Audits Division public reference room 2000 L Street, N.W., Room 812, Washington, D.C. Copies are also available from ITS.

For further information, contact Alicia Dunnigan at (202) 418-0810.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

MCI Telecommunications Corporation — File No. I-T-C-95-031

Application for Authority pursuant to Section 214 of the Communications Act of 1934, as amended, to Provide Switched Services via International Private Lines Interconnected to Public Switched Networks in the United States and the United Kingdom

MEMORANDUM OPINION, ORDER AND AUTHORIZATION

Adopted: March 7, 1995; Released: March 21, 1995

By the Chief, International Bureau:

I. INTRODUCTION

1. In this order, we grant MCI Telecommunications Corporation ("MCI") authority to provide switched services via its U.S. international private line facilities between the United States and the United Kingdom.

II. BACKGROUND

2. On October 24, 1994, MCI filed the captioned application pursuant to Section 214 of the Communications Act of 1934, as amended, and Section 63.01 of the Commission's Rules. MCI requests authority to provide switched services via international private lines between the United States and the United Kingdom that are interconnected to the public switched network ("PSN") in the United States, or in the United Kingdom, or both.[1]

3. MCI proposes to use its own circuits in transatlantic cable systems in which it owns capacity, including TAT-8, TAT-9 and TAT-10. MCI also proposes to use circuits between U.S. earth stations and INTELSAT Atlantic Ocean Region ("AOR") satellites, which it will obtain from Communications Satellite Corp. ("COMSAT") under tariff. It proposes to procure additional capacity from other satellite providers as well. MCI proposes to connect circuits in these systems with circuits provided by entities that are authorized in the United Kingdom. These circuits will be interconnected to the PSN in the United States and/or the United Kingdom.

4. MCI argues that the Commission should grant its application based on the following: (1) the Commission's determination in its *International Resale Order*[2] that the public interest is served by the provision of international switched services over private lines to those countries which provide resale opportunities equivalent to those afforded by the United States; (2) the Commission's conclusion that equivalent international private line resale opportunities exist in the United Kingdom for U.S.-based carriers seeking to provide service between the United States and the United Kingdom; and (3) the Commission's approval of applications to provide switched services by reselling international private lines between the United States and the United Kingdom. MCI contends that granting its application to provide switched services over its own U.S. international private lines will enable MCI to satisfy customer needs for services at competitive prices and will enable it to continue to participate and compete on the U.S. - U.K. route, which MCI is currently serving. MCI states that it has filed the instant application because the Commission may decide that the proposed service arrangement would constitute private line resale as defined in the Commission's *International Resale Order*. MCI adds that, if the Commission concludes that its proposed service arrangement is not within the ambit of the *International Resale Order*, MCI will withdraw the application.

III. DISCUSSION

5. As an initial matter, resale is defined as an "activity wherein one entity subscribes to the communications services and facilities of another entity and then reoffers communications services and facilities to the public (with or without 'adding value') for profit."[3] Because MCI will be using its own U.S. international private lines to provide switched services between the United States and the United Kingdom, by definition, MCI will not be reselling private line service.

6. MCI's application, however, does fall within the scope of the *International Resale Order*. We interpret this order to require that, whenever a carrier seeks to reroute switched traffic not subject to the settlements process over private lines interconnected to the PSN, that carrier must seek separate authorization to do so under Section 214.[4] To obtain Commission authorization, an applicant must demonstrate that the subject country affords resale opportunities equivalent to those available under U.S. law.[5] This

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[1] On November 2, 1994, we placed the application on public notice (Report No. I-7061). No comments were received.

[2] *Regulation of International Accounting Rates*, CC Docket No. 90-337, Phase II, First Report and Order, 7 FCC Rcd 559 (1991) (*International Resale Order*), *modified in part on recon.*, 7 FCC Rcd 7927 (1992).

[3] *International Resale Order*, 7 FCC Rcd at 565 n.7 (citing *Regulatory Policies Concerning Resale and Shared Use of Common Carrier Services and Facilities*, 60 FCC 2d 261, 271 (1976), *recon.*, 62 FCC 2d 588 (1977), *aff'd sub nom. American Telephone and Telegraph Company v. FCC*, 572 F.2d 17 (2d Cir.), *cert. denied*, 439 U.S. 875 (1978)).

[4] *See Market Entry and Regulation of Foreign-affiliated Entities*, Notice of Proposed Rulemaking, IB Docket No. 95-22, FCC 95-53 (released Feb. 17, 1995), at para. 79.

[5] *International Resale Order*, 7 FCC Rcd at 560. *See also American Telephone and Telegraph Company*, Memorandum Opinion, Order and Authorization, DA 95-119 (Int. Bur. released Jan. 30, 1995), *erratum* (released Feb. 16, 1995), *app. for review pending*.

equivalency requirement is designed to prevent the detrimental effects of one-way resale and the diversion of switched traffic from the international settlements process. Here, MCI proposes to reroute switched traffic over an international private line connected at one or both ends to the PSN. Therefore, MCI must obtain a separate Section 214 authorization to provide the proposed service and must demonstrate that the destination market, the United Kingdom, affords resale opportunities equivalent to those available in the United States.

7. The Commission has previously concluded that the United Kingdom provides equivalent resale opportunities.[6] Additionally, we find that grant of the application will allow MCI to become a more effective competitor in the provision of switched services. Use of its U.S. international private lines to provide switched services should foster lower prices, innovative services and increased responsiveness to consumer needs on the U.S. - U.K. route. Consequently, we grant MCI's application and authorize MCI to provide switched services via international private lines between the United States and United Kingdom that are interconnected to the U.S. PSN, or the U.K. PSN, or both.

IV. ORDERING CLAUSES

8. Upon consideration of the above-captioned application, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision by MCI of switched services between the United States and the United Kingdom via international private lines interconnected to the PSN at either or both ends.

9. Accordingly, IT IS ORDERED that application File I-T-C-95-031 IS GRANTED.

10. IT IS FURTHER ORDERED that the conditions imposed in *MCI Communications Corporation*, File No. I-S-P-93-013, Declaratory Ruling and Order, 9 FCC Rcd 3960 (1994) (*MCI Declaratory Ruling*), paras. 64 - 67 and 70 are hereby imposed as conditions of this authorization; and that all filings required to be made pursuant to these conditions be submitted to the International Bureau.

11. IT IS FURTHER ORDERED that neither MCI nor any persons or companies directly or indirectly controlling it or controlled by it, or under direct or indirect common control with it, shall acquire or enjoy any right, for the purposes of handling or interchanging traffic to or from the United States, its territories or possessions which is denied to any other U.S. carrier by reason of any concession, contract, understanding, or working arrangement to which MCI or any such persons or companies controlling or controlled by MCI are parties. MCI shall additionally comply with Section 63.14 of the Commission's Rules, 47 C.F.R. § 63.14 (*see MCI Declaratory Ruling*, 9 FCC Rcd at 3966-67, para. 35).

12. IT IS FURTHER ORDERED that MCI shall comply with Section 203 of the Communications Act, 47 U.S.C. § 203, Part 61, and Sections 43.51 and 43.61 of the Commission's Rules, 47 C.F.R. Part 61, and §§ 43.51 and 43.61.

13. IT IS FURTHER ORDERED that MCI shall comply with any current and future Commission policies and requirements concerning international accounting and settlement rates, and shall file copies with the Commission of any operating agreements which it enters into with its foreign correspondents within 30 days of their execution.

14. IT IS FURTHER ORDERED that the authority granted herein for the provision of switched services via international private lines between the United States and the United Kingdom is limited to the provision of such services between the United States and the United Kingdom only -- that is, traffic that originates in the United States and terminates in the United Kingdom, or traffic that originates in the United Kingdom and terminates in the United States.

15. This Order is issued under Section 0.261 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the public notice of this Order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

Scott Blake Harris
Chief, International Bureau

[6] *See ACC Global Corp. and Alanna Inc.*, 9 FCC Rcd 6240 (1994).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

ACC GLOBAL CORP. File No. I-T-C-95-081

Application for authority to acquire and operate facilities for provision of communications services between the United States and various overseas points.

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: March 10, 1995; Released: March 22, 1995

By the Chief, Telecommunications Division:

1. Upon consideration of the above-captioned uncontested application, filed pursuant to Section 214 of the Communications Act of 1934, as amended, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require a grant thereof.

2. Accordingly, IT IS ORDERED, that application File No. I-T-C-95-081 IS GRANTED, and ACC Global Corp. (ACC) is authorized to:

a. establish channels of communication between appropriately licensed U.S. earth stations and INTELSAT satellites, for provision of Intelsat Business Services (IBS), International Television Service and Datanet Service between the United States and the international points listed in Comsat's tariffs for the space segment of these services;

b. lease from Comsat and operate the satellite circuits specified in Appendix A, between appropriately licensed U.S. earth stations and INTELSAT Atlantic and Pacific Ocean Region satellites, connecting with similar facilities between the satellites and the overseas points listed in Appendix A, furnished by its correspondents;

c. lease from PanAmerican Satellite Corp. (PAS) and operate the satellite circuits specified in Appendix B, between appropriately licensed U.S. earth stations and the PAS-1, PAS-2 and PAS-4 satellites, connecting with similar circuits between the satellites and the overseas points listed in Appendix B, furnished by its correspondents;

d. lease from the Columbia/TDRSS International Satellite System (TDRSS) and operate the satellite circuits specified in Appendix B, between appropriately licensed U.S. earth stations and the TDRS-41 and TDRS-174 satellites, connecting with similar circuits between the satellites and the overseas points listed in Appendix B, furnished by its correspondents;

e. lease from Orion Satellite Corporation (Orion) and operate the satellite circuits specified in Appendix B, between appropriately licensed U.S. earth stations and the Orion F1 satellite, connecting with similar circuits between the satellite and the overseas points listed in Appendix B, furnished by its correspondents;

f. establish channels of communications between appropriately licensed U.S. earth stations and U.S. domestic satellites (also Anik satellites for service to Canada, and Mexican domestic satellites for service to Mexico), for provision of authorized transborder services between the United States and the points listed in Appendix C;

g. lease and operate necessary connecting facilities in the United States;

h. lease a one-half interest in and operate any necessary overseas connecting facilities;

i. use the facilities authorized in b, c, d, and e, above to provide ACC's regularly authorized services, including switched voice and data, and private line services, between the United States and the points specified in Appendices A and B;

j. acquire, on an Indefeasible Right of User (IRU) basis, and operate a one-half interest in up to eight (8) DS-3s in the PTAT-1 cable system;

k. use the authorized capacity to provide ACC's regularly authorized services, including switched voice and data, and private line services, between the United States and Bermuda the United Kingdom, and Ireland as specified in Appendix D;

l. use the authorized PTAT-1 cable capacity for transit arrangements for indirect service between the United States and the international points listed in Appendices A and B;

3. IT IS FURTHER ORDERED that neither ACC nor any persons or companies directly or indirectly controlling or controlled by ACC, or under direct or indirect common control with it, shall acquire or enjoy any right, for the purposes of handling or interchanging traffic to or from the United States, its territories or possessions, which is denied to any other United States carrier by reason of any concession, contract, understanding, or working arrangement to which ACC or any persons or companies controlling or controlled by ACC are parties.

4. IT IS FURTHER ORDERED that our authorization of ACC to provide private lines as part of its authorized services is limited to the provision of such private lines only between the United States and the countries listed in the Appendices -- that is, private lines which originate in the United States and terminate in one of the countries listed in the Appendices or which originate in one of the countries listed in the Appendices and terminate in the United States. In addition, ACC may not -- and ACC's tariff must state that its customers may not -- connect private lines provided over these facilities to the public switched network at either the U.S. or foreign end, or both, for the provision of international switched basic services, unless authorized to do so by the Commission upon a finding that the destination country affords resale opportunities equivalent to those available under U.S. law, in accordance with *Regulation of International Accounting Rates, Phase II, First Report and Order*, 7 FCC Rcd 559 (1991), Order on Reconsideration and Third Further Notice of Proposed Rulemaking, 7 FCC Rcd 7927 (1994), *petition for reconsideration pending.*

5. IT IS FURTHER ORDERED that the applicant shall file copies of any operating agreements entered into with its foreign correspondents with the Commission within 30 days of their execution, and shall otherwise comply with the filing requirements contained in Section 43.51 of the Commission's Rules, 47 C.F.R. §43.51.

6. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. §203 and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this Order.

7. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61.

8. IT IS FURTHER ORDERED that ACC shall obtain prior authority pursuant to Section 214 of the Communications Act, 47 U.S.C. §214, before adding any circuits or channels of communication for the provision of service over the PTAT-1 cable system or any non-common carrier facility.

9. IT IS FURTHER ORDERED that this authorization is issued subject to the terms and conditions of any license for the PTAT-1 cable system issued herein under the Act entitled "An Act relating to the landing and operation of submarine cables in the United States," 47 U.S.C. §§ 34-39.

10. IT IS FURTHER ORDERED that the number of circuits authorized herein for the provision of services via separate satellite systems is subject to limitations on the number of circuits specified under the separate systems policy and applicable consultations under Article XIV(d) of the INTELSAT Agreement.

11. This Order is issued under Section 0.261 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this Order (see Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

Diane J. Cornell
Chief, Telecommunications Division
International Bureau

APPENDIX A

COUNTRIES TO BE SERVED VIA INTELSAT NUMBERS INDICATE 64-KBPS VOICE-GRADE CIRCUITS

Country	Circuits	Country	Circuits	Country	Circuits
Argentina	50	Guinea	50	Poland	50
Australia	50	Haiti	50	Portugal	50
Austria	50	Honduras	50	Romania	50
Bahamas	50	India	50	Saudi Arabia	50
Barbados	50	Indonesia	50	Senegal	50
Belgium	50	Iran	50	Serbia and Montenegro	50
Bolivia	50	Ireland	50	Singapore	50
Brazil	50	Israel	50	Somalia	50
Canada	50	Italy	50	South Africa	50
Czech Republic	50	Jamaica	50	Spain	50
Chile	50	Japan	50	Sweden	50
China, People's Republic	50	Jordan	50	Switzerland	50
Croatia	50	Kenya	50	Syria	50
Denmark	50	Korea, Republic of	50	Taiwan	50
Dominican Republic	50	Kuwait	50	Thailand	50
Ecuador	50	Lebanon	50	Trinidad & Tobago	50
Egypt	50	Liechtenstein	50	Uganda	50
El Salvador	50	Luxembourg	50	United Arab Emirates	50
Ethiopia	50	Malaysia	50	United Kingdom	50
Finland	50	Mexico	50	Uruguay	50
France	50	Morocco	50	Vietnam	50
Guantanomo Bay	50	Netherlands	50	Venezuela	50
Germany, Federal Republic of	50	Netherlands Antilles	50	Zaire	50
Ghana	50	New Zealand	50		
Greece	50	Nicaragua	50		
Guatemala	50	Norway	50		
		Panama	50		
		Peru	50		
		Philippines	50		

APPENDIX B

COUNTRIES TO BE SERVED VIA PAS-1 (NOT INTERCONNECTED)

Up to ten 64-Kbps voice-grade circuits between the United States and each of the following countries:

Ku-band Countries

Anguilla
Austria
Azerbaijan
Bahamas
Belgium
Bermuda
Bosnia-Herzegovenia
British Virgin Is.
Cayman Islands
Czech Republic
Denmark
France
Germany
Greece
Ireland
Italy
Luxembourg
Monaco
Montserrat
Netherlands
Portugal
Romania
Russian Fed.
Serbia and Montenegro
Spain
Sweden
Switzerland
T.F.Y.R. of Macedonia
Turks & Caicos Is.
United Kingdom

C-band Countries:

Anguilla
Argentina
Aruba
Bahamas
Barbados
Bermuda
Bolivia
Brazil
British Virgin Is.
Cayman Islands
Chile
Colombia
Costa Rica
Dominican Rep.
Ecuador
Guatemala
Haiti
Honduras
Jamaica
Mexico
Montserrat
Netherlands Antilles
Panama
Paraguay
Peru
Trinidad and Tobago
Turks & Caicos Is.
Uruguay
Venezuela

COUNTRIES TO BE SERVED VIA PAS-1 (INTERCONNECTED)

Up to six 64-Kbps voice grade circuits between the United States and each of the following countries:

Ku-band Countries:
Azerbaijan
Bahamas
Bosnia-Herzegovenia
Czech Republic
Portugal
Romania
Russian Fed.
Serbia and Montenegro
T.F.Y.R. of Macedonia
United Kingdom

C-Band Countries:
Bahamas
Costa Rica
Dominican Republic
Netherlands Antilles
Panama
Peru

COUNTRIES TO BE SERVED VIA PAS-2 (NON-INTERCONNECTED)

Up to ten 64-Kbps voice-grade circuits between the United States and each of the following countries:

United Kingdom

COUNTRIES TO BE SERVED VIA PAS-2 (INTERCONNECTED)

Up to six 64-Kbps voice-grade circuits between the United States and each of the following countries:

United Kingdom

COUNTRIES TO BE SERVED VIA PAS-4 (NON-INTERCONNECTED)

Up to ten 64-Kbps voice-grade circuits between the United States and each of the following countries:

Australia
Hong Kong
New Zealand

COUNTRIES TO BE SERVED VIA PAS-4 (INTERCONNECTED)

Up to six 64-Kbps voice-grade circuits between the United States and each of the following countries:

Australia
Hong Kong
New Zealand

COUNTRIES TO BE SERVED VIA COLUMBIA'S TDRSS (NON-INTERCONNECTED)

Up to ten 64-Kbps voice-grade circuits between the United States and each of the following countries:

TDRS-41
Austria
Bahamas
Belgium
Bosnia-Herzegovenia
Canada
Denmark
Finland
France
Germany
Ireland
Israel
Jamaica
Liechtenstein
Luxembourg
Mexico
Netherlands
Portugal
Serbia and Montenegro
Sweden
Switzerland
T.F.Y.R. of Macedonia
Turkey
United Kingdom

TDRS-174
Hong Kong
Japan
Mexico
Philippines
Republic of Korea

COUNTRIES TO BE SERVED VIA TDRSS (INTERCONNECTED)

Up to six 64-Kbps voice-grade circuits between the United States and each of the following countries:

TDRS-41
Germany
Bosnia-Herzegovenia
Serbia and Montenegro
T.F.Y.R. of Macedonia
United Kingdom

TDRS-174
Hong Kong

COUNTRIES TO BE SERVED VIA ORION F1 (INTERCONNECTED)

Up to six 64-Kbps voice-grade circuits between the United States and each of the following countries:

Germany
Ireland
The Netherlands
Poland
Sweden

COUNTRIES TO BE SERVED VIA ORION F1 (NON-INTERCONNECTED)

Up to ten 64-Kbps voice-grade circuits between the United States and each of the following countries:

Austria
Belgium
Denmark
France
Germany
Ireland
Italy
Luxembourg
Norway
Poland
Serbia and Montenegro
Sweden
T.F.Y.R. of Macedonia
The Netherlands
United Kingdom

APPENDIX C

COUNTRIES TO BE SERVED VIA AUTHORIZED U.S. DOMESTIC SATELLITES, MEXICAN MORELOS (AND SOLIDARIDAD) SATELLITES, AND ANIK SATELLITES

Anguilla	Domestic Satellites
Antigua and Barbuda	Domestic Satellites
Bahamas	Domestic Satellites
Barbados	Domestic Satellites
Belize	Domestic Satellites
Bermuda	Domestic Satellites
British Virgin Islands	Domestic Satellites
Canada	Domestic Satellites, ANIK
Cayman Islands	Domestic Satellites
Dominica	Domestic Satellites
Grenada	Domestic Satellites
Grenadines	Domestic Satellites
Mexico	DomSats, Morelos and Solidaridad
Montserrat	Domestic Satellites
Netherlands Antilles	Domestic Satellites
St. Kitts & Nevis	Domestic Satellites
St. Lucia	Domestic Satellites
St. Vincent	Domestic Satellites
Turks & Caicos	Domestic Satellites
Venezuela	Domestic Satellites

APPENDIX D

Cable System	Capacity	Countries
PTAT-1	2 DS-3	Bermuda
PTAT-1	2 DS-3	Ireland
PTAT-1	4 DS-3	United Kingdom

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

LDDS Communications, Inc.	File Nos. I-T-C-93-320
MFS International, Inc.	I-T-C-94-049
	I-T-C-94-051
Frontier Communications International, Inc.	I-T-C-94-381
Global Telecommunications, Inc.	I-T-C-94-436

Applications for Authority Pursuant to Section 214 of the Communications Act of 1934, As Amended, to Resell International Private Lines between the United States and the United Kingdom for the Provision of Switched and Private Line Services

MEMORANDUM OPINION, ORDER AND AUTHORIZATION

Adopted: March 10, 1995; Released: March 22, 1995

By the Chief, Telecommunications Division:

I. INTRODUCTION

1. The Commission has under consideration the five above-captioned applications, filed pursuant to Section 214 of the Communications Act, as amended (the Act), for authority to resell international private lines between the United States and the United Kingdom for the provision of switched and private line services. For the reasons stated below, we grant these applications.

II. BACKGROUND

2. LDDS Communications, Inc. (LDDS) and MFS International, Inc. (MFSI) seek authority to resell international private lines of other carriers between the United States and the United Kingdom that are either interconnected at both ends to the public switched network, or at one end only, for the purpose of providing switched telecommunications services, including operator assisted services.[1] Global Telecommunications, Inc. (Global) seeks authority to resell private lines between the United States and the United Kingdom interconnected at both ends to provide switched services,[2] and Frontier Communications International, Inc. (Frontier)[3] seeks similar authority to resell both interconnected private lines to provide switched services and noninterconnected private lines to provide private line services.[4]

3. These applications were placed on public notice, and AT&T filed a petition to deny against each of them. LDDS, Global, and MFSI filed oppositions, and AT&T responded.

III. DISCUSSION

4. The Commission has already concluded that international private line resale serves the public interest in encouraging cost-based international telecommunications services. This finding is conditioned, however, on there being steps taken to ensure that such resale does not result in the unilateral diversion of U.S. inbound switched traffic to private lines, thus exacerbating the U.S. settlements deficit. The Commission therefore requires that U.S. carriers permit the resale of their international private lines to only those countries which provide equivalent resale opportunities.[5] The Commission most recently addressed the issue of equivalency in *ACC/Alanna*,[6] where it found opportunities to resell international private lines for the provision of switched services are substantially equivalent in the United Kingdom to those available in the United States, and thus granted the applications of ACC and Alanna to provide switched service via resold private lines.[7] As a result of this decision, the resale of interconnected international private lines between the United States and the United Kingdom is permitted subject to appropriate Section 214 authorization.

5. AT&T filed a petition to deny against each of the subject applications. In each case, AT&T opposes grant of the application because it maintains the United Kingdom

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[1] LDDS and MFSI both propose to resell international private lines pursuant to the following carriers' appropriate tariffs: AT&T Tariff Nos. 2, 9, 11, and 12; C&W Tariff No. 3; MCI Tariff Nos. 1 and 2; MCI/OTI Tariff Nos. 1 and 2; MCI/WU Tariff Nos. 20 and 27; Sprint Tariff Nos. 1, 2, 5, and 7. LDDS proposes to lease and operate 29 E-1 links. MFSI proposes to lease and operate 30 E-1 links.

[2] Global proposes to resell international private lines pursuant to the following carriers' appropriate tariffs: AT&T Tariff Nos. 2, 9, 11, and 12; C&W Tariff No. 3; MCI Tariff Nos. 1 and 2; MCI/OTI Tariff Nos. 1 and 2; MCI/WU Tariff Nos. 20 and 27; Sprint Tariff Nos. 1, 2, 5, and 7. Global proposes to lease and operate 96 voice grade circuits.

[3] Frontier originally filed its application under the name RCI Long Distance, Inc. On November 9, 1994, Frontier notified the Commission of its name change. *See* Letter from Philip V. Permut and Cari R. Frank, Counsel for Frontier Communications International, Inc., to William Caton, Secretary, FCC, dated November 9, 1994.

[4] Frontier proposes to resell international private lines pursuant to the following carriers' appropriate tariffs: AT&T Tariff Nos. 1, 2, 9, 11, and 12; Sprint Tariff Nos. 1, 2, 5, and 7; MCI/WU tariff Nos. 20 and 27; MCI Tariff Nos. 1 and 2; C&W Tariff No. 3; LDDS Tariff No. 1; Litel Tariff No. 1; Wiltel Tariff No. 2. Frontier proposes to lease and operate two T-1 and five digital data/voice circuits.

[5] *See Regulation of International Accounting Rates*, CC Docket 90-337, Phase II First Report and Order (*International Resale Order*), 7 FCC Rcd 559 (1992).

[6] *ACC Global Corporation and Alanna Inc.*, 9 FCC Rcd 6240 (1994) (*ACC/Alanna*).

[7] *Id.*; The Commission conditioned the applicants' ability to initiate service upon the United Kingdom's finding that the United States is an equivalent country. On October 20, 1994, the United Kingdom found the United States equivalent. *See* FCC Public Notice, Reference No. 50350, (October 24, 1994).

does not offer private line resale opportunities equivalent to those available under U.S. law.[8] In the case of LDDS and MFSI, AT&T asks that its Petition to Deny in BT North America, Inc. (*BTNA*),[9] and its subsequent Reply be incorporated by reference in this proceeding.[10] In its Petitions to Deny Frontier's and Global's applications, AT&T asks that its pleadings and the pleadings of Telstra (UK) Ltd. in *ACC/Alanna*[11] be incorporated by reference.[12]

6. In each of its Petitions to Deny, however, and in the associated pleadings, AT&T relies on its assertion that the United Kingdom does not afford resale opportunities equivalent to those available under U.S. law. We examined these arguments fully in *ACC/Alanna,* and determined that the United Kingdom affords equivalent resale opportunities. Subsequently, we reiterated these conclusions in *BTNA*.[13] Therefore, we find to be moot AT&T's arguments in this proceeding that the United Kingdom does not afford equivalent resale opportunities.

IV. ORDERING CLAUSES

7. Upon consideration of the applications and in view of the foregoing, IT IS HEREBY CERTIFIED that the present and future convenience and necessity require the grant of authorization to Global, LDDS, Frontier and MFSI to resell international private lines between the United States and the United Kingdom that are interconnected to the public switched network for the provision of switched services, and in the case of Frontier, also to resell noninterconnected private lines for the provision of private line services.

8. Accordingly, IT IS ORDERED that applications File Nos. I-T-C-93-320, I-T-C-94-049, I-T-C-94-051, I-T-C-94-381, and I-T-C-94-436 ARE GRANTED, and LDDS, MFSI, Global and Frontier are authorized to resell international private lines for the provision of switched services, and in the case of Frontier, private line services, between the United States and the United Kingdom pursuant to the applicable tariffs of the authorized U.S. common carriers specified, *supra,* in notes 1, 2, and 4.

9. IT IS FURTHER ORDERED that LDDS' Motion for Leave to File Late-Filed Opposition and AT&T's Motion for Leave to File Late-Filed Reply ARE GRANTED.

10. IT IS FURTHER ORDERED that LDDS is authorized to lease and operate a one-half interest in up to 29 E-1 circuits, pursuant to the tariffs of the appropriately authorized U.S. carriers, for the provision of its authorized resale of international private lines for switched services between the United States and the United Kingdom.

11. IT IS FURTHER ORDERED that MFSI is authorized to lease and operate a one-half interest in up to 30 E-1 circuits, pursuant to the tariffs of the appropriately authorized U.S. carriers, for the provision of its authorized resale of international private lines for switched services between the United States and the United Kingdom.

12. IT IS FURTHER ORDERED that Global is authorized to lease and operate a one-half interest in up to 96 voice grade circuits, pursuant to the tariffs of the appropriately authorized U.S. carriers, for the provision of its authorized resale of international private lines for switched services between the United States and the United Kingdom.

13. IT IS FURTHER ORDERED that Frontier is authorized to lease and operate a one-half interest in up to 2 T-1 and 5 digital voice/data circuits, pursuant to the tariffs of the appropriately authorized U.S. carriers, for the provision of its authorized resale of international private lines for switched and private line services between the United States and the United Kingdom.

14. IT IS FURTHER ORDERED that the authority granted herein to resell international private lines for the provision of switched services between the United States and the United Kingdom is limited to the provision of such services between the United States and the United Kingdom only -- that is private lines which carry traffic that originates in the United States and terminates in the United Kingdom, or traffic which originates in the United Kingdom and terminates in the United States.

15. IT IS FURTHER ORDERED that neither LDDS, MFSI, Global, Frontier, nor any person or companies directly or indirectly controlling them or controlled by them, or under direct or indirect common control with them, shall acquire or enjoy any right for the purposes of handling or interchanging traffic to or from the United States, its territories or possession which is denied to any other United States carrier by reason of any concession contract, understanding, or working arrangement to which these applicants or any such persons or companies controlling or controlled by the applicants are parties.

16. IT IS FURTHER ORDERED that each applicant shall file with the Commission a copy of any operating agreement it enters into with its foreign correspondents within thirty (30) days of execution, and shall otherwise comply with the filing requirements contained in Section 43.51 of the Commission's Rules, 47 C.F.R. Section 43.51.

17. IT IS FURTHER ORDERED that each applicant shall file tariff provisions pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this Order.

18. IT IS FURTHER ORDERED that the applicants, as nondominant international private line resellers, shall file on a semi-annual basis with the Commission the information contained in the annual reports of overseas telecommunications traffic filed pursuant to Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61.

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[8] AT&T Petition to Deny Applications of MFSI, at 2; AT&T Petition to Deny Application of RCI, at 2; AT&T Petition to Deny Application of LDDS, at 2; AT&T Petition to Deny Application of Global Telecommunications, at 2.

[9] *BT North America, Inc.*, DA 95-120, released January 30, 1995 (*BTNA*).

[10] AT&T Petitions to Deny Applications of LDDS and MFSI each cited BT North America Application, File No. ITC-93-126. AT&T's Petition to Deny that application was filed on April 15, 1993, and AT&T's Reply was filed on May 11, 1993.

[11] *ACC/Alanna*, 9 FCC Rcd 6240.

[12] AT&T Petition to Deny Application of RCI, at 2; AT&T Petition to Deny Application of Global, at 2. We will grant AT&T's request to incorporate the specified pleadings.

[13] *See ACC/Alanna*, 9 FCC Rcd at 6272; *BTNA*, DA 95-120, at 3.

19. IT IS FURTHER ORDERED that the applicants shall file semi-annual circuit additions to certificated points, pursuant to Section 63.15(b) of the Commission's rules, 47 C.F.R. Section 63.15(b).

20. IT IS FURTHER ORDERED that the applicants shall file all arrangements for the interconnection of private lines to the U.S. public switched network, pursuant to Section 43.51(a) of the Commission's Rules, 47 C.F.R. Section 43.51(a).

21. IT IS FURTHER ORDERED that grant of these authorizations is conditioned on the United Kingdom's continuing to afford resale opportunities equivalent to those afforded under U.S. law.

22. IT IS FURTHER ORDERED that this order may be subject to future modification or revocation pursuant to the outcome of the *Phase II Third Further Notice*, 7 FCC Rcd 8040 (1992), and other relevant proceedings.

23. This Order is issued under Section 0.261 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the public notice of this Order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

Diane J. Cornell
Chief, Telecommunications Division

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Petition for Amendment of the Commission's Rules to Establish First and Second Class Radiotelephone Operator Licenses. RM-8400

ORDER

Adopted: March 15, 1995; Released: March 22, 1995

By the Chief, Wireless Telecommunications Bureau:

1. On September 21, 1993, Jim Wills (Wills) filed a petition (RM-8400) requesting that the Commission's Rules be amended to establish First and Second Class Radiotelephone operator licenses. That petition was denied by *Order* of the Acting Deputy Chief, Private Radio Bureau[1] (Bureau) on May 13, 1994. The Bureau found that the proposal would not serve the public interest because it would create license classes for which the Commission has no requirements and would result in significant administrative burdens.

2. Wills has filed a second rule making petition, dated September 2, 1994, requesting essentially the same amendment of the Commission's Rules that the Bureau declined to make previously. We will, therefore, treat the second petition of Wills as a request for reconsideration of the Bureau's denial of his earlier petition. Petitions for reconsideration of final actions must be filed within thirty days of the release date of the Commission's decision. *See* Section 1.106(f) of the Commission's Rules, 47 C.F.R. § 1.106(f), and Section 405(a) of the Communications Act of 1934, as amended, 47 U.S.C. § 405(a). This requirement is statutory and cannot be waived. *See Reuters Ltd. v. FCC*, 781 F2d 946, 951-952 (D.C. Cir. 1986). Accordingly, the second petition of Mr. Wills must be dismissed because it was not timely filed.

3. Even if the second petition were construed as a new petition for rule making, it would still have to be dismissed as repetitive. *See* Section 1.401(e) of the Commission's Rules, 47 C.F.R. § 1.401(e).

4. In view of the foregoing, and pursuant to Sections 1.106(f) and 1.401(e) of the Commission's Rules, 47 C.F.R. §§ 1.106(f) and 1.401(e), and Section 405(a) of the Communications Act of 1934, as amended, 47 U.S.C. § 405(a), the second petition of Jim Wills IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Regina M. Keeney
Chief, Wireless Telecommunications Bureau

[1] Now the Wireless Telecommunications Bureau.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-352

In re Application of

Ronald E. Patterson File No. BPH-880812MZ
Cal E. Varner d/b/a
CAPITOL CITY BROADCASTING
COMPANY

For Construction Permit
For A New FM Station on
Channel 247C, Lonview, Texas

ORDER

Adopted: March 14, 1995; Released: March 22, 1995

By the Commission:

1. Before the Commission for consideration is the Review Board's Decision in this proceeding, 9 FCC Rcd 7861 (Rev. Bd. 1994), and an Application for Review filed January 19, 1995 by Capitol City Broadcasting Company. Having carefully considered the matters of record herein, we agree with the Board's disposition of this case and affirm its Decision.

2. ACCORDINGLY, IT IS ORDERED, That pursuant to 47 C.F.R. § 1.115(g) the Application for Review filed January 19, 1995 by Capitol City Broadcasting Company IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Liability of
KLDT-TV 55, Inc.

Licensee of Television Station
KLDT, Lake Dallas, Texas

for a Forfeiture

MEMORANDUM OPINION AND ORDER

Adopted: March 6, 1995; Released: March 22, 1995

By the Commission:

1. The Commission has under consideration a $20,000 Notice of Apparent Liability (NAL)[1] issued September 1, 1993, to KLDT-TV 55, Inc., licensee of television station KLDT, Lake Dallas, Texas, for violations of 47 C.F.R. §§ 73.1125 (main studio), 73.3526 (public inspection file), and 73.3613 (filing of contracts). The licensee's October 1, 1993, response to the NAL asks that no fine be imposed because the violations, if any, were minor.

2. The main studio rule, 47 C.F.R. § 73.1125, requires each licensee to maintain a "meaningful management and staff presence" at its main studio location. *Main Studio and Program Origination Rules (Clarification)*, 3 FCC Rcd 5024 (1988). In *Jones Eastern of Outer Banks, Inc.*, 6 FCC Rcd 3615 (1991), *clarified*, 7 FCC Rcd 6800 (1992), the Commission defined a minimally acceptable "meaningful presence" as full-time managerial and full-time staff personnel. It further stated that there must be "management and staff presence on a full-time basis during normal business hours to be considered 'meaningful.'" 6 FCC Rcd at 3616 n.2; *see also* 7 FCC Rcd at 6800 n.4. As explained in the NAL, it appeared that the KLDT main studio was not properly staffed based on four different visits to the station in March, June, and July 1992. On each of these occasions, the party or parties seeking access to the studio during normal business hours (weekdays at 3 p.m., 11:30 a.m., 1 p.m., and 10 a.m.) found it unattended.

3. The licensee argues that it did not violate our rule governing main studio requirements. It asserts that the main studio was staffed during the times in question in accordance with the Commission's statements in the *Jones Eastern* decisions. The president of the licensee corporation claims that both she and her operations manager maintained offices at the main studio, where they spent a substantial amount of time on a daily basis, and that their brief absences to attend to legitimate station business were within the bounds of our rule, which, according to *Jones Eastern Clarification*, 7 FCC Rcd at 6802, does not require that management personnel "be chained to their desks." It is clear, however, from our *Main Studio* and *Jones Eastern* decisions cited above, that the main studio must be attended during normal business hours. Accordingly, we reject the licensee's argument, based on the quoted language from the *Jones Eastern Clarification*, that where the entire staff consists of two individuals, both of whom are managers, it is not a violation of our rule to leave the main studio completely unattended during normal business hours.

4. In addition, the licensee disputes the allegation that KLDT's studio hours were not regular or normal. The licensee has not stated, however, what those regular or normal hours were, and we are not convinced that the "staffing lulls" discovered by the complainants and by the FCC investigators were, as the licensee contends, unique events that occurred over a limited period of time. The licensee minimizes the complaint we received, describing two visits to an unattended main studio on June 4, 1992, as "unverified," and the July 21, 1992, morning visit to an unattended studio by FCC investigators, as a single "anecdotal showing." Yet it has given us no reason to doubt the complainants' assertions, especially in light of FCC investigators' March and July experiences, which corroborate them. Taken together, these four incidents furnish persuasive evidence of a main studio that failed to provide a meaningful presence for members of the community seeking to contact station personnel or to review the public inspection file. Accordingly, we reject the licensee's contention that it was in compliance with the main studio rule, and that any noncompliance was minor.

5. The licensee states that it should not be penalized for these instances in which the operations manager had deviated from explicit instructions to remain at the studio during normal business hours. We refuse to rescind or reduce the forfeiture for such a reason, since longstanding Commission precedent holds a licensee responsible for the acts or omissions of its employees. *See, e.g., James C. Vernon*, 30 FCC 2d 456 (1971).

6. During an inspection of the station on July 21, 1992, FCC investigators reviewed KLDT's public file and noted that certain required materials were not included.[2] The licensee argues that the ownership report was inexplicably missing after having been placed in the file in a timely manner. As for the other missing items, the licensee argues that they were available at the station but, not being spe-

[1] *KLDT-TV 55, Inc.*, 8 FCC Rcd 6316 (1993).

[2] The file did not contain the station's 1991 annual ownership report, letters received from the public regarding operation of the station, a list of programs that have provided the station's most significant treatment of community issues, and records demonstrating how the licensee responded to the educational and informational needs of children in its overall programming, as required by 47 C.F.R. § 73.3526(a)(3), (7), (8)(i), and (8)(iii), respectively. The significant issues list must include "a brief narrative describing what issues were given significant treatment and the programming that provided this treatment." The children's programming records "should indicate, at a minimum, the time, date, duration and a brief description of the program." *See* note 3, *infra*.

cifically requested,[3] they were not provided. Even if undisputed, this does not nullify the violation of our rule which requires the licensee to "maintain for public inspection a file *containing* the material described in [various paragraphs of this rule]" (emphasis added). 47 C.F.R. § 73.3526(a). Thus, certain records are plainly required to be placed in the public inspection file, and a simple request to see the file should be sufficient to elicit the complete file without the further necessity of asking for missing documents piecemeal. Furthermore, this violation is not, as the licensee characterizes it, a minor matter of "three items" missing from the file. Rather, three entire categories of documents relevant to the licensee's compliance with important FCC requirements were missing from the file, a violation further exacerbated by the general unavailability of the file because of the main studio staffing problems discussed above.

7. With its September 11, 1992, response to a Commission letter of inquiry, the licensee furnished, for the first time, a copy of its April 16, 1992, agreement which granted Word of Faith Outreach Center Church an option to purchase all the assets of KLDT-TV 55, Inc. Section 73.3613 of our Rules requires that such a document be filed with the Commission within 30 days of execution. The licensee states that this agreement had not previously been filed with the Commission because its attorney had advised that FCC rules did not require such a filing. Allegedly faulty advice of counsel will not excuse a licensee's failure to comply with the rules, *see Triad Broadcasting Co.*, 96 FCC 2d 1235 (1984), and we therefore see no reason to reduce or rescind the forfeiture for this violation, which continued for four months.

8. As a final matter, the licensee states that it performs a valuable service for the community through its programming and should not be penalized so harshly[4] for the incidents described above. Claims of service to the community are not normally accepted in mitigation of a forfeiture, and in this case we do not believe the licensee's showing warrants such mitigation. *See, e.g., Pacific Broadcasting Corp.*, 44 FCC 2d 1076 (1974); *Esther Blodgett*, 18 FCC 2d 6 (1969); *Folkways Broadcasting Co.*, 12 FCC 2d 887 (1968).

9. We will, however, reconsider the forfeiture amount because in calculating the apparent monetary liability of $20,000, the NAL relied, in part, upon the standards of our *Policy Statement, Standards for Assessing Forfeitures*, 6 FCC Rcd 4695 (1991), *recon. denied* 7 FCC Rcd 5339, *revised*, 8 FCC Rcd 6215 (1993) ("Policy Statement"). These forfeiture standards have since been set aside by the United States Court of Appeals. *See United States Telephone Assn. v. FCC*, 28 F.3d 1232 (D.C. Cir. 1994). Accordingly, we will directly apply to the specific circumstances of this case the relevant statutory factors in Section 503(b)(2) of the Communications Act, including the nature, circumstances, extent, and gravity of the violations. Our past decisions that predated the Policy Statement, and intervening legislative changes,[5] will also be relevant to this reconsideration.

10. With regard to the licensee's failure to file its agreement with Word of Faith pertaining to ownership of the station, we note that various filing transgressions throughout the years 1966 through 1972 generally resulted in $1,000 forfeitures to the broadcast licensees involved.[6] Considering the increase in our forfeiture authority since those decisions, and the relatively short period of KLDT's noncompliance with respect to this agreement (roughly four months), we believe that a forfeiture in the amount of $4,000 is an appropriate sanction in this case.

11. To determine an appropriate monetary forfeiture for KLDT's main studio violations, we have reviewed the precedent and compared the seriousness of KLDT's main studio deviations with those involved in other main studio cases, generally ranging in forfeiture amount from $5,000 to $10,000. We believe that the decision in *International Panorama TV, Inc.*, 52 FCC 2d 258 (1975), assessing a forfeiture of $5,000, is useful as guidance in this case. It involved a licensee's relocation of its main studio without

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[3] The FCC investigators state that, in response to their specific request for the children's programming lists and significant issues lists, the operations manager offered the station's program logs, which appeared to be inadequate for purposes of the rule since they contained no narrative or descriptions and, moreover, were not part of the public inspection file. Concerning letters from the public, the investigators recall being advised that these were being kept at another location outside the studio.

[4] It claims that payment of the forfeiture would jeopardize its ability to continue operations, given the losses it sustained in 1991 and 1992 and the costs associated with defending its license renewal application which is currently being challenged. The licensee has provided no specific information to support this assertion. It failed to furnish any information as to its financial condition (no balance sheets, statements of cash flow, income statements, or other financial data). Nor has it provided information about costs associated with its license renewal. In fact, it has not followed through on its statement in the October 1, 1993, response, that tax returns demonstrating the station's unprofitable condition would "be supplied at a later date." We cannot find a justification for reducing or rescinding the forfeiture for financial hardship reasons, based on the licensee's bare assertion.

[5] In 1989, Congress amended Section 503(b) of the Communications Act. Pub. L. No. 239, 101st Cong., 1st Sess., 103 Stat. 2131 (1989). Among other things, the amendment increased the dollar amounts of this agency's forfeiture authority, to better serve as a meaningful sanction and deterrent to others. *See* Budget Reconciliation Act, House Conf. Rep. No. 386 at 435, *reprinted in* 1989 U.S. Code Cong. & Ad. News at 3038.

[6] These violations involved failures to file annual financial reports, see, e.g., *Lawrence W. Adams*, 72 FCC 2d 490 (1966), and *Pick Radio Co.*, 34 FCC 2d 400 (1972); stock transfers, see, e.g., *Shamrock Broadcasting, Inc.*, 2 FCC 2d 492 (1966); and ownership information, see, e.g., *Baron Radio, Inc.*, 25 RR 2d 1035 (1972) (failure to have public file available at published location and failure to report its acquisition of another station). When higher forfeiture amounts were assessed for filing violations, there were other complicating factors involved, e.g., other violations such as those in *Victor Valley Broadcasters, Inc.*, 2 FCC 2d 495 (1966) ($2,000 forfeiture for failure to file two agreements transferring ownership of a radio station and for relinquishing control without applying for or obtaining Commission consent); *High Country Broadcasting Corp.*, 4 FCC Rcd 1528 (1989) ($5,000 forfeiture for failing to file network affiliation agreement, ownership report, and for engaging in two unauthorized transfers of control); *J.B. Broadcasting of Baltimore, Ltd.*, 49 FCC 2d 412 (1974) ($10,000 forfeiture for failure to report changes in officers and directors, failure to file annual financial reports, and, more seriously, various repeated technical violations indicating an abdication of'" control).

authority,[7] a condition that lasted approximately five weeks. This period of time is roughly equivalent to the seven weeks that KLDT's main studio was improperly attended. We also look to *The Dalton Group, Inc.*, 6 FCC Rcd 646 (1991), in which the NAL and Forfeiture Order (issued prior to the 1989 increase in our forfeiture authority) imposed a $10,000 monetary penalty for main studio, public inspection file, and program origination rule violations. The main studio, with its entire staff and its public inspection file, had been relocated without authority outside the community of license, a condition that lasted more than a year before it was corrected by grant of a proper application. In the case before us now, the evidence indicates that during the time in question the main studio within the community of license was, unlike the cases cited, operational and open to the public at least for some hours on some days, albeit not on a predictable schedule. Accordingly, notwithstanding the significant increase in our forfeiture authority since these earlier decisions, we believe that a $7,500 forfeiture for KLDT's main studio violation is warranted.

12. Despite the fact that the two main studio cases discussed in the preceding paragraph also include (either explicitly or implicitly) public inspection file violations as a component, we believe that an additional forfeiture amount, separate from the main studio issue, is warranted here. Unlike the licensees in the cases cited above, KLDT, in addition to failing to make its public inspection file readily available, failed to maintain in such file several types of documents that this agency has repeatedly emphasized are critically important to the public's ability to participate effectively in evaluating a station's ongoing programming and its license renewal application. (See footnote 2.) After reviewing various cases involving a broadcast station's failure to maintain complete records for use by the public, we believe a $4,000 forfeiture is appropropriate for this licensee's several serious public inspection file omissions. *See, e.g., Southern Arkansas Radio Co.*, 6 FCC Rcd 5130 (MMB 1991) ($4,000 forfeiture for "substantially incomplete" public inspection file and no political file).[8]

13. Accordingly, pursuant to Section 503(b) of the Communications Act of 1934, as amended, IT IS ORDERED, that KLDT-TV 55, Inc., licensee of television station KLDT, Lake Dallas, Texas, FORFEIT to the United States the sum of fifteen thousand five hundred dollars ($15,500) for the willful and repeated violations of Sections 73.1125, 73.3526, and 73.3613 of the Commission's Rules, as described above. Payment of the forfeiture may be made by mailing to the Commission a check or similar instrument payable to the Federal Communications Commission. In regard to this forfeiture proceeding, the licensee may take any of the actions set forth in Section 1.80 of the Commission's Rules, as summarized in the attachment to this Memorandum Opinion and Order.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

[7] Although the case makes no mention of the public inspection file, it seems likely that the file was moved along with everything else.

[8] The NAL, published at 67 RR 2d 1653, was issued in July 1990, after our forfeiture authority had increased. While KLDT did not violate the political file rule, it did fail to comply with another record-keeping obligation (not applicable to radio stations) adopted to implement a statute expressing specific concern with educational and informational programming for children. *See* the Children's Television Act of 1990, Pub. L. No. 101-437, 104 Stat. 996-1000, *codified at* 47 U.S.C. §§ 303a, 303b and 394.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

American Telephone and Telegraph Company — File No. I-T-C-93-162

AT&T (UK) Limited

Application for Authority Under Section 214 of the Communications Act to Provide International Switched Services via International Private Lines Interconnected to the Public Switched Networks in the United States and the United Kingdom

MEMORANDUM OPINION, ORDER AND AUTHORIZATION

Adopted: January 27, 1995; Released: January 30, 1995

By the Chief, International Bureau:

I. INTRODUCTION

1. On April 15, 1993, American Telephone and Telegraph Company ("AT&T") and AT&T (UK) Limited filed the above-captioned application seeking authority pursuant to Section 214 of the Communications Act ("the Act"), as amended, to provide switched services via international private lines between the United States and the United Kingdom that are interconnected to the public switched network ("PSN") in the United States, or in the United Kingdom, or both. For the reasons stated below, we grant AT&T's application.

II. BACKGROUND

2. AT&T requests authority to connect AT&T-owned facilities in transatlantic cable systems in which AT&T owns capacity, including TAT-8, TAT-9 and TAT-10, with private line half-channels to be leased by AT&T (UK) from British Telecommunications ("BT"), or Mercury Communications, Ltd. ("MCL") at BT's or MCL's prevailing tariff rates. The circuits will be interconnected to the PSN on the U.S. or U.K. end, or both. They will be used to provide certain of AT&T's authorized services, including International Message Telecommunications Service ("IMTS"), in accordance with AT&T's tariffs, and to terminate U.K.-outbound services provided to U.K. customers by AT&T (UK). As such, AT&T asserts, this arrangement will constitute international private line resale, as defined in the *International Resale Order*.[1] AT&T Application at 6. In that order, the Commission required that applicants seeking authority under Section 214 of the Communications Act to interconnect private lines to the U.S. or foreign PSN for the purpose of providing international switched services demonstrate that the destination foreign market affords opportunities for resale that are equivalent to those available under U.S. law.[2] AT&T also notes that, concurrent with the instant application, AT&T filed in the U.K. a request for a license to resell international private lines between the United Kingdom and the United States, interconnected to the PSN on both ends.[3]

3. We placed the application on public notice on April 28, 1993. BTNA, IDB Communications Group, Inc. ("IDB"), and Motor-Columbus AG ("Motor-Columbus") filed comments on the application. AT&T filed an opposition to the comments and Motor-Columbus filed a reply.

III. COMMENTS

4. IDB and Motor-Columbus make essentially identical arguments in their comments. IDB and Motor-Columbus assert that AT&T does not need to obtain Commission authorization for the services covered by the instant application because it already has authorization as a facilities-based carrier.[4] Motor-Columbus observes that the Commission has stated:

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[1] *Regulation of International Accounting Rates*, CC Docket No. 90-337, Phase II, First Report and Order, 7 FCC Rcd 559 (1991) (*"International Resale Order"*).

[2] AT&T contends that it has demonstrated in pleadings opposing a similar application filed by BT North America ("BTNA") that equivalent resale opportunities do not exist in the United Kingdom. The Commission has, in the interim, concluded that the United Kingdom does provide equivalent resale opportunities. *See ACC Global Corp.* and *Alanna Inc.*, 9 FCC Rcd 6240 (1994). Accordingly, we dismiss AT&T's contentions regarding the U.K. market as moot. Moreover, consistent with the Commission's finding concerning the U.K. market, we are granting, concurrently with this order, BTNA's application for authorization to resell international private lines between the United States and the United Kingdom for the provision of switched services. *See BT North America, Inc.*, DA 95-120, released January 27, 1994.

[3] On December 20, 1994 the U.K. Department of Trade and Industry (DTI) announced the grant of two new telecommunications licenses. DTI granted Concert (the joint venture between British Telecommunications plc and MCI) a non-Public Telecommunications Operator ("PTO") license for the provision of global telecommunications services for the transmission of corporate voice, data and image communications through the resale of international private circuits. In addition, DTI granted AT&T a PTO license to provide both domestic facilities-based switched voice and data services and private line services and international resale services.

[4] IDB and Motor-Columbus also contend that AT&T (UK) is not a proper party to the pending application because AT&T (UK) would only provide service in the United Kingdom and the Commission has no jurisdiction over such services. In response, AT&T asserts that AT&T (UK) is a proper party to the application. AT&T notes that the Commission's *International Resale Order* requires "the applicant seeking to resell the U.S. carrier's private line services to make the equivalency demonstration with respect to the subject country in its Section 214 application." AT&T Opposition at 4. AT&T therefore concludes that AT&T (UK) is a proper party to the instant application.

> The court [in *Executet*] . . . decreed that a Section 214(a) authorization permits a carrier to offer any service which the authorized facility can be used to provide in the absence of a Section 214(c) condition that expressly prohibits the use of a facility to provide a particular service.

Motor-Columbus Comments at 5 (quoting *MTS and WATS Market Structure*, 75 FCC 2d 644, 648 (1980)). IDB and Motor-Columbus also express concern that grant of AT&T's application "could be used to curtail the Title II authority which other facilities-based international carriers now have and thus to block the international private line services which these carriers currently provide in competition with AT&T." Motor-Columbus Comments at 6. BTNA does not oppose AT&T's application, but contends that it is deficient in that it fails to demonstrate that equivalent private line resale opportunities exist in the United Kingdom as required by Section 63.01(k)(5) of the Commission's rules, 47 C.F.R. § 63.01(k)(5).

5. In its opposition to the comments, AT&T disputes BTNA's contention that its application is deficient. AT&T explains it seeks Section 214 authorization only in the event the Commission concludes that equivalent private line resale opportunities exist in the United Kingdom and therefore grants BTNA's application. AT&T also asserts that the legal issues raised by IDB and Motor Columbus provide no basis for denying AT&T's application. AT&T states that:

> Motor-Columbus and IDB are correct that AT&T seeks to use its own previously authorized circuits to interconnect with a reseller in the U.K., and AT&T would not, therefore, be engaged in "resale." Moreover, under the *Executet* decision, AT&T's prior authorizations are legally sufficient to permit AT&T to use its circuits to provide switched services by interconnecting with resold private line circuits on the foreign end. . . . AT&T's decision to submit its application. . . is based on its unavoidable need to position itself competitively to provide switched services via resold private line arrangements between the U.S. and U.K.

6. In reply to AT&T's opposition, Motor-Columbus states that AT&T appears to agree with the arguments advanced in Motor-Columbus's comments. Motor-Columbus contends that AT&T's opposition makes unclear, however, whether AT&T (UK) would be reselling only the U.K. half-circuit or would be reselling the U.S. half-circuit as well. Motor-Columbus urges us to grant the application only to the extent that AT&T (UK) seeks authorization to resell U.S. half-circuits.

IV. DISCUSSION

7. We grant AT&T's application. We note first that AT&T will be using its own private lines in the United States. AT&T will therefore not be reselling private line service in the United States. In the United Kingdom, on the other hand, AT&T (UK) will be reselling private lines it leases from BT or MCL. We interpret the *International Resale Order* to require that, whenever a carrier seeks to reroute switched traffic not subject to the settlements process over private lines interconnected to the PSN, that carrier must seek separate authorization to do so under Section 214. The *International Resale Order* sought to protect the U.S. public interest against the detrimental effects of one-way resale by requiring an applicant for authority to resell international private lines in the United States to demonstrate that equivalent resale opportunities exist in the destination market. We were concerned about diversion of switched traffic from the international settlements process. The traffic configuration AT&T proposes, which routes switched traffic over an international private line connected at one or both ends to the PSN, is therefore subject to this equivalency requirement. A separate 214 is necessary to enable us to enforce the Commission's equivalency requirement. For this reason, we conclude that AT&T must obtain the additional Section 214 authorization it seeks in this application.

8. We agree generally with Motor-Columbus and IDB that under *Executet* AT&T's existing authorizations are adequate to allow it to offer any lawful service over the authorized facilities.[5] The Court also held, however, that "Section 214(c) . . . authorize[s] the Commission to restrict the services that may be offered over a communication line once it is built, acquired, or extended." *Executet*, 561 F.2d at 377. The Court went on to note that such a restriction must be based on the Commission's affirmative determination that the public convenience and necessity require it. *Id.* As we have stated, the Commission's *International Resale Order* affirmatively determined that the public convenience and necessity require a separate Section 214 authorization as a mechanism to enforce its equivalency requirement whenever a carrier seeks to reroute switched traffic over private lines interconnected to the PSN.[6]

9. We find that the present and future public convenience and necessity require the grant of this authorization to AT&T, subject to its continued regulation as a dominant carrier for the provision of IMTS. We will regulate as dominant AT&T's provision of the services hereby authorized because of AT&T's market power in the U.S. IMTS market and not due to its affiliation with a foreign carrier.[7] We therefore grant AT&T authorization to provide switched services via international private lines between the United States and the United Kingdom that are interconnected to the U.S. PSN, or the U.K. PSN, or both.

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[5] *See MCI Telecommunications Corp. v. FCC*, 561 F.2d 365 (D.C. Cir. 1977) ("*Executet*").

[6] Although AT&T appears to endorse the reading of *Executet* advanced by IDB and Motor-Columbus, we conclude that the fact that AT&T filed the instant application demonstrates that AT&T interprets the *International Resale Order* as we do.

[7] Although AT&T is affiliated with a foreign carrier -- AT&T (UK) -- no party argues, and we find no evidence in the record to suggest, that AT&T (UK) has the ability to discriminate in favor of AT&T through control of bottleneck services or facilities in the United Kingdom. We therefore find no reason to condition this authorization on the additional regulatory safeguards we apply to carriers regulated as dominant under Section 63.10 of the Commission's rules, 47 C.F.R. § 63.10.3

V. ORDERING CLAUSES

10. Upon consideration of the above-captioned application, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision by AT&T of switched services to the United Kingdom via international private lines interconnected to the Public Switched Network at either or both ends.

11. Accordingly, IT IS ORDERED that application File I-T-C-93-162 IS GRANTED to the extent indicated herein.

12. IT IS FURTHER ORDERED that the application File I-T-C-93-162 filed by AT&T (UK) Limited IS DISMISSED.

13. IT IS FURTHER ORDERED that neither AT&T nor any persons or companies directly or indirectly controlling it or controlled by it, or under direct or indirect common control with it, shall acquire or enjoy any right, for the purposes of handling or interchanging traffic to or from the United States, its territories or possessions which is denied to any other United States carrier by reason of any concession, contract, understanding, or working arrangement to which AT&T or any such persons or companies controlling or controlled by AT&T are parties. *See also* 47 C.F.R. § 63.14.

14. IT IS FURTHER ORDERED that AT&T shall comply with Section 203 of the Communications Act, 47 U.S.C. §203, Part 61, and Sections 43.51 and 43.61 of the Commission's Rules, 47 C.F.R. Part 61, and §§43.51 and 43.61.

15. IT IS FURTHER ORDERED that AT&T, as a dominant carrier, shall request Section 214 authorization for all circuit additions to the United Kingdom, pursuant to Section 63.01 of the Commission's Rules, 47 C.F.R. §63.01.

16. IT IS FURTHER ORDERED that AT&T shall comply with any current and future Commission policies and requirements concerning international accounting and settlement rates and shall file copies of any operating agreements which it enters into with its foreign correspondents within 30 days of their execution.

17. IT IS FURTHER ORDERED that the authority granted herein for the provision of switched services between the United States and the United Kingdom is limited to the provision of such services between the United States and the United Kingdom only -- that is, traffic that originates in the United States and terminates in the United Kingdom, or traffic that originates in the United Kingdom and terminates in the United States.

18. This Order is issued under Section 0.261 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the public notice of this Order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

Scott Blake Harris
Chief, International Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

BT North America, Inc. File No. I-T-C-93-126

Application for Authority
Under Section 214 of the Communications
Act to Provide International Resale
Services as a Nondominant
Common Carrier

MEMORANDUM OPINION, ORDER AND AUTHORIZATION

Adopted: January 27, 1995; Released: January 30, 1995

By the Chief, International Bureau:

I. INTRODUCTION

1. On March 8, 1993, BT North America ("BTNA")[1] requested authority, pursuant to Section 214 of the Communications Act, 47 U.S.C. § 214, to resell, as a nondominant carrier: (i) switched services between the United States and various international points; (ii) international private lines for the provision of non-interconnected private line services between the United States and Australia, Canada, France, Germany, the Netherlands, Sweden and the United Kingdom; and (iii) international private lines, interconnected at one end or both ends to the public switched network, for the provision of switched services between the United States and the United Kingdom and between the United States and Canada.[2]

II. BACKGROUND

2. We placed the original application on public notice on March 17, 1993. We received six petitions to deny or comments in opposition,[3] and three other sets of comments.[4] Subsequently, BTNA filed an opposition to the petitions to deny and a response to the comments. We received ten filings[5] responding to BTNA's pleadings.

3. On October 6, 1994, the Commission released an order granting two applications for authorization to resell international private lines for the provision of switched services between the United States and the United Kingdom.[6] In that order the Commission found that:

> On balance. . . the evidence submitted in the record demonstrates that equivalent international private lineresale opportunities exist in the United Kingdom for U.S.-based carriers seeking to provide service between the United States and the United Kingdom.

ACC/Alanna Order at para. 2.

4. On November 14, 1994, we released an order that granted BTNA authority, as a dominant carrier, to resell switched services between the United States and various international points and to resell international private lines for the provision of non-interconnected private line services between the United States and the above-referenced countries.[7] That order deferred consideration of BTNA's request for authority to resell interconnected international private lines for the provision of switched services between the United States and Canada and the United Kingdom and deferred consideration of BTNA's request to be regulated as a nondominant carrier. We now grant BTNA authority to resell international private lines, subject to the conditions outlined in this order.

III. DISCUSSION

5. Most of the comments filed in response to BTNA's application argue that the United Kingdom does not afford resale opportunities equivalent to those available under U.S. law.[8] Commenters' principal contentions include assertions that there are significant barriers to entry into the U.K. market and that the U.K. regulatory regime does not provide adequate protection against abuse of BT's market

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[1] BTNA, a Delaware corporation, is a wholly-owned subsidiary of BT USA Holdings ("BT USA"), a Delaware corporation. BT USA is a wholly-owned subsidiary of British Telecommunications plc ("BT"), a company organized under the laws of England and Wales. BT is the dominant provider of local, long distance and international telephone service in the United Kingdom.

[2] BTNA proposes to resell the international private line and switched services pursuant to the appropriate following carriers' tariffs: AT&T FCC Tariff Nos. 1, 2, 4, 9, 11 and 12; C&W FCC Tariff No. 3; MCI International FCC Tariff No. 1; MCI-OTI FCC Tariff No. 3; MCI-WUI FCC Tariff No. 27; Sprint FCC Tariff Nos. 1, 2, 5 and 7; Worldcom FCC Tariff No. 1; TRT-FTCC FCC Tariff No. 14; TRT International FCC Tariff No.1; and FTCC FCC Tariff Nos. 17 and 23.

[3] MCI Communications Corporation ("MCI"), Sprint Communications Company L.P. ("Sprint"), AT&T, Graphnet, Inc. ("Graphnet"), Business Telecom, Inc. and Securities Communications Network ("SCN") each filed a petition to deny or comments in opposition.

[4] The British Embassy filed comments in support, while ACC Global Corp. ("ACC") filed comments in conditional support. Alanna, Inc. also filed comments to distinguish its own Section 214 international private line resale application from BTNA's.

[5] AT&T, Sprint, MCI, and SCN each filed a reply to opposition. ACC and the British Embassy filed reply comments. In addition, comments were filed by the Information Industry Association ("IIA") and the Information Technology Association of America ("ITAA") (takes no position, but urges the Commission to act promptly). Finally, AT&T replied to *ex parte* comments filed by the British Embassy.

[6] *ACC Global Corp. and Alanna, Inc.*, 9 FCC Rcd 6240 (1994) (*ACC/Alanna Order*). We note also that the Commission has declared the Canadian market equivalent as well. *See fONOROLA Corp.*, 7 FCC Rcd 7312 (1992), *recon. granted in part* 9 FCC Rcd 4066.

[7] *BT North America, Inc.*, DA 94-1257, released Nov. 14, 1994 (Int. Bur.) (*November 14 Order*).

[8] A number of commenters raised additional, unrelated issues that we addressed in the *November 14 Order* at paras. 13-14. Having already resolved these matters we do not address them again here.

power. The substance of these arguments is not different from arguments addressed by the Commission in the *ACC/Alanna Order*. After giving these arguments full consideration, the Commission concluded that the United Kingdom affords equivalent resale opportunities to those available under U.S. law. We therefore need not revisit that issue in this order.[9]

6. Similarly, a number of commenters oppose BTNA's request that it be regulated as a nondominant carrier. In order to expedite consideration of its application, BTNA on February 4, 1994, stated that it would accept dominant carrier regulation on all of its proposed routes.[10] In the *November 14 Order* we deferred consideration of BTNA's request that it be regulated as a nondominant carrier and concluded that we would continue to regulate BTNA as dominant for the services authorized in that order.[11]

7. We conclude that BTNA must be regulated as a dominant carrier for all authorized services on the U.S-U.K. route.[12] BTNA's parent, BT, controls bottleneck facilities in the United Kingdom. BT is currently the dominant carrier in a duopoly for the provision of international facilities-based services, controls over 90 percent of the local termination points, and has the most fully developed long distance network to which interconnection is essential for the distribution of international traffic. On this basis, we find that BT has the ability to discriminate against unaffiliated U.S. carriers.[13] We therefore conclude that the public interest requires that we continue to regulate BTNA as a dominant carrier for the services authorized in this order and in the *November 14 Order* on the U.S-U.K. route. We find no reason on this record to regulate BTNA as dominant for the provision of any authorized services on any other certified routes.[14]

8. AT&T also argues that we should condition any grant of resale authority to BTNA on BTNA's agreement to reduce accounting rates "towards cost-based, competitive levels."[15] AT&T argues that granting resale authority will allow BTNA to bypass the settlements process and thereby exacerbate the U.S. net settlements deficit with the United Kingdom. In response, BTNA argues that we should impose no such condition because granting its application will increase resale competition and thus exert downward pressure on accounting rates. BTNA also notes that BT's accounting rate is within the benchmark range that the Commission established in its Accounting Rates docket.[16] Finally, BTNA asserts that AT&T and other U.S. carriers are largely to blame for the U.S. net settlements deficit due to their promotion of country-direct services.

9. We agree with AT&T that, although BT's accounting rates with U.S. carriers are within the benchmark range, these rates are still significantly above cost. BTNA does not deny this. We understand AT&T to ask that we delay the introduction of additional competition on the U.S.-U.K. route until AT&T is able to negotiate lower accounting rates with BT. We do not believe delaying competition is in the public interest.

10. Nevertheless, reducing accounting rates surely is in the public interest and we must consider the impact that thisp authorization of the United Kingdom's dominant carrier will have on our goal of reducing accounting rates to cost. As we have noted, BTNA contends that grant of its application will exert downward pressure on accounting rates. Of course, BTNA's parent, BT, can negotiate lower accounting rates with U.S. carriers at any time. Indeed, BT and U.S. carriers have made progress in recent years in reducing accounting rates. To ensure this progress continues -- and is not slowed by this authorization -- we will require as a condition of this authorization that BTNA file (within sixty days of release of this order) a plan setting forth further significant reductions by BT towards cost-based accounting rates with U.S. carriers over the next two years.

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[9] We note, however, that AT&T contends that we should assess whether the U.K. affords U.S. carriers market access comparable to that U.S. law affords U.K. carriers. As we stated in the *November 14 Order*, it has not been our practice to review Section 214 applications on the basis of comparable market access. Such a change in policy would more appropriately be considered in the context of a rulemaking proceeding as AT&T has requested in a pending petition for rulemaking.

[10] *See* Letter from Joan M. Griffin, BTNA to George S. Li, Chief, International Facilities Division, Common Carrier Bureau (February 4, 1994). We placed BTNA's request on public notice on February 8, 1994 (Report No. I-6925). In response, we received comments in opposition from AT&T, ACC, SCN and Graphnet. Cable & Wireless, Inc. (CWI) filed comments in response to AT&T's comments in opposition. BTNA then filed reply comments to which Sprint and ACC replied. In a subsequent *ex parte*, AT&T filed supplemental comments. On March 8, 1994, BTNA filed a letter requesting immediate action on its bifurcation request. *See* Letter from Joan M. Griffin, BTNA to George S. Li, Chief, International Facilities Division, Common Carrier Bureau.

[11] *See November 14 Order* at para. 16.

[12] Because BTNA is indirectly wholly owned by BT, it is an "affiliate" of BT, a foreign carrier, within the meaning of Section 63.01(r) of the Commission's rules, 47 C.F.R. § 63.01(r). Under Section 63.10 of the Commission's Rules, 47 C.F.R. § 63.10, a U.S. carrier that has an affiliation with a foreign carrier that is not a monopoly in the destination country and that seeks to be regulated as nondominant on that route (here, the U.S.-U.K. route) bears the burden of submitting information to the Commission sufficient to demonstrate that its foreign affiliate lacks the ability to discriminate against unaffiliated U.S. carriers through control of bottleneck services or facilities in the destination country. *See* 47 C.F.R. § 63.10(a)(3).

[13] *See U.S. v. MCI Communications Corp. and BT Forty-Eight Co.(NEWCO)*, Case No. 1:94CV01317 (D.D.C. filed June 15, 1994). We also note that, pursuant to the Complaint and Final Judgment filed by the Department of Justice in connection with this transaction, neither MCI nor NEWCO will be able to lease international facilities or services to BT, or any of its affiliates or subsidiaries, for its provision of international simple resale ("ISR") until certain specified conditions are satisfied, including that all qualified U.S. carriers' pending licenses in the United Kingdom be granted and that those carriers be offered reasonable interconnection. *See* Final Judgment at II.E. The Final Judgment defines ISR as the transmission through private or leased international telecommunications facilities of voice or data traffic, if that traffic is carried over the public switched telecommunications network in both the country where the traffic originates and the country where it terminates.

[14] *See* 47 C.F.R. § 63.10(a)(1).

[15] AT&T Petition to Deny at 38.

[16] *Regulation of International Accounting Rates*, Phase II, Second Report and Order, 7 FCC Rcd 8040 (1992) (*Second Report and Order* and *Second Further Notice*). In that order, the Commission adopted benchmark ranges to assist U.S. carriers in negotiating accounting rates with their foreign correspondents.

11. We conclude that the public interest will be served by the grant of this application in that it introduces additional competition in the resale of international telecommunications services. Competition fosters lower prices, innovative services and increased responsiveness to consumer needs, all of which in turn should help to stimulate U.S. economic growth. Grant of BTNA's application is also in the public interest because it should encourage liberalization of other telecommunications markets around the world. The success of the United States and the United Kingdom in opening their markets to competition may encourage other countries to emulate these procompetitive policies and make their telecommunications markets more open to foreign investment and increased competition.

12. Accordingly, we find that the present and future public convenience and necessity require the grant of authorization to BTNA to resell international interconnected private lines between the United States and the United Kingdom and the United States and Canada.

IV. ORDERING CLAUSES

13. Upon consideration of the above-captioned application, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the resale by BTNA of international private lines interconnected to the public switched network at one end or both ends for the provision of switched services to the general public between the United States and Canada and between the United States and the United Kingdom.

14. Accordingly, IT IS ORDERED that application File I-T-C-93-126 IS GRANTED and BTNA is authorized to resell the tariffed international private lines of authorized U.S. common carriers. BTNA is authorized to resell up to 16 E-1 circuits to Canada and up to 29 E-1 circuits to the United Kingdom, as requested in its application.

15. IT IS FURTHER ORDERED that neither BTNA nor any persons or companies directly or indirectly controlling it or controlled by it, or under direct or indirect common control with it, shall acquire or enjoy any right, for the purposes of handling or interchanging traffic to or from the United States, its territories or possessions which is denied to any other United States carrier by reason of any concession, contract, understanding, or working arrangement to which BTNA or any such persons or companies controlling or controlled by BTNA are parties. *See also* 47 C.F.R. § 63.14.

16. IT IS FURTHER ORDERED that BTNA shall comply with Section 203 of the Communications Act, 47 U.S.C. §203, Part 61, and Sections 43.51 and 43.61 of the Commission's Rules, 47 C.F.R. Part 61, and §§43.51 and 43.61.

17. IT IS FURTHER ORDERED that BTNA, as a dominant carrier on the U.S.-U.K. route, shall request Section 214 authorization for all circuit additions to the United Kingdom pursuant to Section 63.01 of the Commission's Rules, 47 C.F.R. §63.01.

18. IT IS FURTHER ORDERED that BTNA, as a dominant carrier on the U.S.-U.K. route, shall file quarterly reports of revenue, number of messages, and number of minutes of both originating and terminating traffic for all international services between the United States and the United Kingdom 90 days after the end of each calendar quarter.

19. IT IS FURTHER ORDERED that BTNA, as a nondominant international private line reseller between the United States and Canada, shall file on a semi-annual basis with the Commission the information contained in the annual reports of overseas telecommunications traffic filed pursuant to Section 43.61 of the Commission's rules, 47 C.F.R. § 43.61.

20. IT IS FURTHER ORDERED that BTNA shall file semi-annual circuit additions to Canada, pursuant to Section 63.15 of the Commission's rules, 47 C.F.R. § 63.15.

21. IT IS FURTHER ORDERED that BTNA shall comply with any current and future Commission policies and requirements concerning international accounting and settlement rates and shall file copies of any operating agreements which it enters into with its foreign correspondents within 30 days of their execution. BTNA shall also file with the Commission copies of any operating agreements entered into by its parent/affiliate that affect traffic or revenue flow between the United States and the United Kingdom within 30 days of their execution.

22. IT IS FURTHER ORDERED that BTNA shall (within 60 days of release of this order) file with the Commission a plan setting forth significant reductions by BT towards cost-based accounting rates with U.S. carriers over the next two years.

23. IT IS FURTHER ORDERED that the authority granted herein to resell international private lines for the provision of switched services between the United States and the United Kingdom is limited to the provision of such services between the United States and the United Kingdom only -- that is, private lines which carry traffic that originates in the United States and terminates in the United Kingdom, or traffic that originates in the United Kingdom and terminates in the United States.

24. This Order is issued under Section 0.261 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the public notice of this Order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

Scott Blake Harris
Chief, International Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
February 2, 1995

Released: February 10, 1995

Mr. Michael Ruger
Baker and Hostetler
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036-5304

IN REPLY REFER TO:
DA 95-191

Dear Mr. Ruger:

This letter is in response to your inquiry of January 3, 1994 on behalf of Home and Garden Television Network ("HGTV") requesting clarification of the new "going forward" rules[1] as they relate to new product tiers ("NPTs"). You note that, subject to certain conditions, the Cable Services Bureau has waived the notice requirements contained in Sections 76.964 and 76.309(c)(3)(i)(B) of the Commission's rules for new programming channels added to cable programming service tiers ("CPSTs") in the first quarter of 1995.[2] You ask whether that waiver is applicable to channels added to NPTs during the same period.

You suggest that extending the waiver to NPTs would be justified because Section 76.987(a) of the Commission's rules defines an NPT as a type of CPST. You also suggest that since Section 76.987(c) expressly contemplates offering a programming service on both a CPST and an NPT, it would be incongruous for an operator to be able to utilize the above-described waiver for channels added to CPSTs,[3] but not when the same channels are added to NPTs. We find these arguments persuasive.

We therefore waive the notice requirements contained in Sections 76.964 and 76.309(c)(3)(i)(B) of the Commission's rules with respect to the addition of new programming channels to NPTs in the first quarter of 1995. We condition this waiver, however, on the company providing notice through alternative means substantially similar to those described in the Disney Letter,[4] which incorporates by reference conditions in the November 23 letter from Disney to Cable Services Bureau,[5] and no less likely to come to the attention of a substantial number of viewers. Those conditions are weekly newspaper advertisements in a major newspaper or newspapers with circulation throughout each affected cable community, on-screen messages on a daily basis, notifying local franchising authorities as soon as practicable, and written notice to subscribers beginning no later than 15 days after the channel addition.[6] Our notification rules are intended in part to provide subscribers with the opportunity to cancel any service they no longer wish to receive due to a rate or service change. Therefore as a further condition of the waiver, we require that if any subscriber cancels his or her subscription to the relevant NPT within thirty days after the date of the first bill reflecting the increased rate, the operator must refund to that subscriber the incremental dollar amount attributable to the addition of new programming channel(s) to the NPT added pursuant to this waiver through the date the subscriber cancels the NPT. This waiver applies to new channels added to a system's offerings, as well as to channels previously offered on the system on an a la carte basis. This is a blanket waiver which is applicable to all similarly situated operators seeking to add services to NPTs as described above.

Finally, we note that this waiver does not affect obligations of cable operators other than those specifically included in this letter. Thus, for example, operators adding channels to NPTs remain obligated (a) to affirmatively market the NPTs where required pursuant to Section 76.987(b)(3) of the Commission's rules and (b) to file rate cards and copies of customer notifications with the Commission pursuant to Section 76.987(g).

Sincerely,

Meredith J. Jones
Chief, Cable Services Bureau

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[1] *See* Sixth Order on Reconsideration, Fifth Report and Order, and Seventh Notice of Proposed Rulemaking (the "*Going Forward Order*"), MM Docket Nos. 92-266 and 93-215, FCC 94-286 (released November 18, 1994).

[2] *See* In re Cox Communications, DA 94-1568 (Cable Services Bureau, adopted December 20, 1994).

[3] *See* In re Cox Communications, DA 94-1568 (Cable Services Bureau, adopted December 20, 1994).

[4] *See* In re The Disney Channel, DA 94-1346 (Cable Services Bureau, adopted November 30, 1994).

[5] Letter from Frederick Kuperberg, Senior Vice President, Business and Legal Affairs, the Disney Channel, to Meredith J. Jones, Chief, Cable Services Bureau (November 23, 1994). Subsequent to our issuance of the Disney letter, the Bureau issued a blanket waiver for the addition of new channels before January 1, 1995, so long as the terms and conditions set forth in the Disney letter were met. *See* In re E! Entertainment Television, Inc., DA 94-1474 (Cable Services Bureau, adopted December 13, 1994).

[6] We note that we have previously granted waivers of our notice provisions in transitional situations where the cable operator provides similar substitute advance notice. *See, e.g.*, In re fX (released May 9, 1994) (providing limited waiver of notice provisions in 47 C.F.R. §§ 76.964 and 76.309(c)(3) as applied to the launch of the new fX channel).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

NewChannels	CUID Nos. NY0205,
Corporation	NY0206, NY0292
Ogdensburg,	NY0811, NY0812, NY0930
New York	NY0931 and NY1532

Benchmark Filing To Support
Cable Programming Service Price

MEMORANDUM OPINION AND ORDER

Adopted: February 8, 1995; Released: February 10, 1995

By the Chief, Cable Services Bureau:

INTRODUCTION

1. Here we consider complaints about the price NewChannels Corporation ("NewChannels") was charging for its cable programming service ("CPS") tier in CUID Nos. NY0205, NY0206, NY0292, NY0811, NY0812, NY0930, NY0931 and NY1532. NewChannels has chosen to attempt to justify its price through a benchmark showing on FCC Form 393. This order addresses the reasonableness of NewChannels's price only through May 14, 1994. At a later date we will issue a separate order addressing the reasonableness of the price after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

PROCEDURAL MATTERS

4. The first CPS complaint was completed and served on NewChannels on December 22, 1993.[11] The Commission received the complaint on January 4, 1994.

5. NewChannels attempted to justify its CPS price through FCC Form 393's filed on February 14, 1994 for CUID Nos. NY0205, NY0811, NY0930 and NY0931 and February 15, 1994 for CUID Nos. NY0206, NY0292, NY0812 and NY1532. NewChannels amended its justifications on July 5, 1994, in response to a Cable Services Bureau Order citing common deficiencies observed in benchmark filings generally.[12]

DISCUSSION

6. NewChannels asserts that its monthly CPS tier price of $11.80 per subscriber is justified by its benchmark filing because its price is equal to the maximum permitted charge of $11.80 as calculated in the filing. Upon review of NewChannels's Form 393, we have found no apparent errors that would require a recalculation of NewChannels's maximum permitted CPS price.

CONCLUSIONS

7. Upon review of the record herein, we conclude that NewChannels has demonstrated that $11.80 per month (plus franchise fee) was the maximum reasonable CPS tier price for the period January 4, 1994 to May 14, 1994.[13]

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[1] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent NewChannels has sought to take advantage of the refund deferral period under the *Second Order on Reconsideration*, n.7 *infra*, the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which NewChannels implemented its CPS price under the new regulations. See para. 3, *infra*.

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] *Order* in MM Docket No. 92-266, *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] *Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking*, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (1994) (*"Second Order on Reconsideration"*); 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration* at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration* at 4189, n.195.

[11] The complaint was dated December 22, 1993 and states that it was mailed to NewChannels on that date. NewChannels has not complied with 47 C.F.R. § 76.956(a), which requires it to state when service occurred. Under these circumstances we will consider December 22, 1993 as the service date.

[12] *Cable Operators' Rate Justification Filings*, DA 94-526 (released May 23, 1994).

[13] This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed

8. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the complaints against the cable programming service price charged by NewChannels Corporation in Ogdensburg, New York, CUID Nos. NY0205, NY0206, NY0292, NY0811, NY0812, NY0930, NY093 and NY1532, and all other complaints relating to the same price, ARE DENIED TO THE EXTENT INDICATED HEREIN.

9. IT IS FURTHER ORDERED, that the benchmark filing submitted by NewChannels Corporation in Ogdensburg, New York with respect to CUID Nos. NY0205, NY0206, NY0292, NY0811, NY0812, NY0930, NY0931 and NY1532 for the period of January 4, 1994 to May 14, 1994, justifies a maximum price of $11.80 per month (plus franchise fee) for NewChannels Corporation's cable programming service tier.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

herein. This finding is based solely on the representations of NewChannels listed in paragraph 5, *supra*, and the modifications described in paragraph 6, *supra*. Should information come to our attention that these representations (including representations as to data regarding installations and customer equipment) were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

CLINTON CABLE LIMITED PARTNERSHIP

Petition for Reconsideration

of the Cable Services Bureau Order Denying Petition for Reconsideration of Eagle Township, Michigan's Certification to Regulate Basic Cable Service Rates (MI0612)

ORDER ON RECONSIDERATION

Adopted: February 9, 1995; Released: February 10, 1995

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. On December 15, 1994, Clinton Cable Limited Partnership ("Clinton") filed a timely petition requesting reconsideration of a *Memorandum Opinion and Order*[1] *("Order")* adopted by the Cable Services Bureau ("the Bureau") pursuant to delegated authority. The *Order* denied Clinton's petition for reconsideration challenging the certification of Eagle Township ("the Township") to regulate rates for basic cable service and associated equipment.[2] In its petition, Clinton requests that the Bureau grant its petition for reconsideration, find that Clinton is subject to effective competition and rescind the Township's certification. The Township did not file an opposition to Clinton's December 15, 1994 petititon.[3]

II. BACKGROUND

2. Section 405 of the Communications Act of 1934, as amended, allows parties to petition for reconsideration of an order, issued by the Commission or its delegated authority.[4] Such a petition must be filed within 30 days from the date of public notice of that action.[5] To warrant consideration, a petition for reconsideration must state the specific form(s) of relief sought by the petitioner and allege with particularity the respects in which the contested action should be changed.[6] The petition should also cite findings of fact or conclusions that the petitioner believes to be in error, and indicate how the petitioner believes they should be changed.[7]

3. Section 623(a)(4) of the Communications Act of 1934, as amended, allows franchising authorities to become certified to regulate basic cable service rates of cable operators that are not subject to effective competition.[8] For purposes of the initial request for certification, local franchising authorities may rely on a presumption that cable operators within their jurisdiction are not subject to effective competition, unless they have actual knowledge to the contrary.[9] Certification becomes effective 30 days from the date of filing unless the Commission finds that the franchising authority does not meet the statutory certification requirements.[10] Cable operators may file petitions for reconsideration of the franchising authority's certification within 30 days from the date such certification becomes effective.[11] Rate regulation is automatically stayed pending review of a timely-filed petition for reconsideration (filed pursuant to Section 76.911 of the Commission's rules) alleging the presence of effective competition.[12]

4. In its original petition for reconsideration, Clinton argued that its Eagle Township system was subject to effective competition in its franchise area. Clinton based its claim of effective competition on the allegation that its system's subscriber penetration rate was less than 30% of the "homes" in its franchise area.[13] To support its claim, Clinton submitted a copy of a computer printout which indicated that its system served 148 subscribers as of October 21, 1993. Clinton also provided a copy of 1990 Census data which indicated that there were 704 "housing units" within the franchise area. In addition, Clinton also submitted a declaration under penalty of perjury by a responsible official certifying to the accuracy of the subscriber data

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[1] *Clinton Cable Limited Partnership*, 9 FCC Rcd 7795 (1994).

[2] The Township filed its Certification of Franchising Authority to Regulate Basic Cable Service Rates and Initial Finding of Lack of Effective Competition ("FCC Form 328") on September 29, 1993. The certification became effective on October 29, 1993.

[3] Section 1.106 of the Commission's rules provides that oppositions to petitions for reconsideration must be filed within 10 days of the date that the petition for reconsideration was filed.

[4] Communications Act of 1934 § 405, 47 U.S.C. § 405.

[5] Communications Act of 1934 § 405, 47 U.S.C. § 405; 47 C.F.R. § 1.106(f).

[6] 47 C.F.R. § 1.106(d)(1).

[7] 47 C.F.R. § 1.106(d)(2).

[8] Communications Act of 1934 § 623(a)(4), 47 U.S.C. § 543(a)(4).

[9] 47 C.F.R. §§ 76.906, 76.910(b)(4).

[10] 47 C.F.R. § 76.910(e). Certification becomes effective unless the Commission determines that: (1) the franchising authority will not adopt or administer rate regulations that are consistent with the Commission's regulations; (2) the franchising authority lacks the legal authority to adopt, or the personnel to administer, rate regulations; (3) procedural laws and regulations applicable to rate regulation proceedings by the franchising authority do not provide a reasonable opportunity for consideration of the views of interested parties; or (4) the cable system in question is subject to effective competition. 47 C.F.R. § 76.910(b). *See also* Communications Act of 1934 § 623(a)(4), 47 U.S.C. § 543(a)(4).

[11] 47 C.F.R. §§ 1.106, 76.911, *Report and Order and Further Notice of Proposed Rulemaking*, MM Docket No. 92-266, 8 FCC Rcd 5631, 5693 (1993).

[12] 47 C.F.R. § 76.911(c).

[13] The 1992 Cable Act (Communications Act of 1934 § 623(a)(2); 47 U.S.C. § 543(a)(2)) and the Commission's rules (47 C.F.R. § 76.905(a)) provide that only the rates of cable systems that are not subject to effective competition may be regulated. One of the bases on which a cable system is deemed subject to effective competition is if fewer than 30 per cent of the households in the system's franchise area subscribe to the system's service. Communications Act of 1934 § 623(l)(1)(A); 47 U.S.C. § 543(l)(1)(A); 47 C.F.R. § 76.905(b)(1).

included in the petition. Using these figures, Clinton argued that the ratio of total Clinton subscribers in relation to the total number of "housing units" in the franchise area yielded a subscriber penetration rate of 21% of the "households" in its franchise area. Because the penetration rate fell below 30%, Clinton argued that its system was subject to effective competition, and that the Township's certification to regulate Clinton's basic cable rates and associated equipment should be rescinded.

5. In its *Order*, the Bureau denied Clinton's petition for reconsideration because Clinton, in deriving its penetration rate, inappropriately relied upon "housing unit" data, rather than household ("occupied housing unit") data, to determine the total number of households in its franchise area. Specifically, the Bureau found that Clinton's "housing unit" count inappropriately included vacant housing units. Because Clinton failed to base its claim on "household" or "occupied housing unit" data, the Bureau rejected Clinton's claim of effective competition.

6. In its petition, Clinton now argues that use of recently located "household" (occupied housing unit) data confirms that its system's penetration level falls below 30%. Specifically, Clinton submits a copy of the relevant page of 1990 Census data which demonstrates that there are 685 occupied housing units in Clinton's franchise area. In addition, Clinton submits updated subscribership data which indicates that Clinton serves a total of 151 subscribers as of January 21, 1995. This yields a penetration level of 22%. Clinton argues that the public interest warrants acceptance of this new data because it demonstrates that Clinton is subject to effective competition based on a low penetration level.

III. DISCUSSION

7. Generally, reconsideration is appropriate where the petitioner shows either a material error or omission in the original order or raises additional facts not known or not existing until after the petitioner's last opportunity to present such matters.[14] A petition for reconsideration which relies on facts or information not previously presented to the Commission or its delegated authority may be considered if the Commission or designated authority determines that consideration of such facts is required in the public interest.[15]

8. In its original petition, Clinton based its effective competition claim on housing unit data which inappropriately included vacant housing units. In this petition, however, Clinton now submits household (*i.e.*, occupied housing unit) data in support of its effective competition claim.[16]

9. Relying on this household data, we find that Clinton currently serves 151 subscribers in an area with 685 households (*i.e.*, occupied housing units). This yields a penetration level of 22%. In light of this, we find that Clinton has submitted sufficient evidence demonstrating that it serves fewer than 30% of the households in its franchise area. Accordingly, its cable system is subject to effective competition and its petition is granted.

IV. ORDERING CLAUSES

10. Accordingly, IT IS ORDERED that the petition for reconsideration filed by Clinton Cable Limited Partnership challenging the certification of Eagle Township, Michigan to regulate basic cable rates IS GRANTED.

11. IT IS FURTHER ORDERED that the certification of Eagle Township, Michigan to regulate the basic cable rates of Clinton Cable Limited Partnership IS RESCINDED.

12. This action is taken pursuant to delegated authority pursuant to Section 0.321 of the Commission's rules, 47 C.F.R. § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

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[14] *WWIZ, Inc.*, 37 FCC 685, 686 (1964), *aff'd sub nom. Lorain Journal v. FCC*, 351 F.2d 824 (D.C. Cir. 1965), *cert. denied*, 383 U.S. 967 (1966). *See also* 47 C.F.R. § 1.106(c).

[15] 47 C.F.R. § 1.106(c)(2).

[16] Clinton provides no adequate reason as to why it failed to submit this data in its original petition and thus this pleading more properly resembles a petition for revocation. Clinton claims that it had no notice that effective competition claims must be demonstrated by using "household" (*i.e.*, occupied housing unit) data. This argument lacks merit. Both the Cable Act and the Commission's rules require that effective competition be demonstrated based on the number of "households" in the franchise area. Communications Act of 1934 § 623(l)(1), 47 U.S.C. § 543(l)(1); 47 C.F.R. § 76.905 (b). As the Commission stated previously, "we presume that Congress did not intend 'households' to have a different meaning than in the 1990 Census that would include vacant units." *Third Order on Reconsideration*, MM Docket Nos. 92-266 and 92-262, 9 FCC Rcd 4316, 4324 (1994) (*"Third Recon. Order"*). The count of "households" in the 1990 Census reflects only occupied housing units. *See* Bureau of the Census, U.S. Dept. of Commerce, 1990 Census of Population, CP-1-1B, Appendix B at B-8. Nonetheless, we note that Section 623(a)(2) of the Communications Act of 1934, as amended, provides that only the rates of cable systems that are not subject to effective competition may be regulated. Moreover, we note that acceptance of this new data reveals that Clinton's penetration level is substantially below the penetration level needed to become subject to rate regulation. In light of these circumstances, we believe that the public interest requires acceptance of this information.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

HORIZON CABLE I LIMITED PARTNERSHIP

Petition for Reconsideration

of the Cable Services Bureau Order
Denying Petition for Reconsideration
of Handy Township, Michigan's Certification
to Regulate Basic Cable Service Rates (MI0612)

ORDER ON RECONSIDERATION

Adopted: February 9, 1995; Released: February 10, 1995

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. On December 15, 1994, Horizon Cable I Limited Partnership ("Horizon") filed a timely petition requesting reconsideration of a *Memorandum Opinion and Order*[1] (*"Order"*) adopted by the Cable Services Bureau ("the Bureau") pursuant to delegated authority. The *Order* denied Horizon's petition for reconsideration challenging the certification of Handy Township ("the Township") to regulate rates for basic cable service and associated equipment.[2] In its petition, Horizon requests that the Bureau grant its petition for reconsideration, find that Horizon is subject to effective competition and rescind the Township's certification. The Township did not file an opposition to Horizon's December 15, 1994 petition.[3]

II. BACKGROUND

2. Section 405 of the Communications Act of 1934, as amended, allows parties to petition for reconsideration of an order, issued by the Commission or its delegated authority.[4] Such a petition must be filed within 30 days from the date of public notice of that action.[5] To warrant consideration, a petition for reconsideration must state the specific form(s) of relief sought by the petitioner and allege with particularity the respects in which the contested action should be changed.[6] The petition should also cite findings of fact or conclusions that the petitioner believes to be in error, and indicate how the petitioner believes they should be changed.[7]

3. Section 623(a)(4) of the Communications Act of 1934, as amended, allows franchising authorities to become certified to regulate basic cable service rates of cable operators that are not subject to effective competition.[8] For purposes of the initial request for certification, local franchising authorities may rely on a presumption that cable operators within their jurisdiction are not subject to effective competition, unlessthey have actual knowledge to the contrary.[9] Certification becomes effective 30 days from the date of filing unless the Commission finds that the franchising authority does not meet the statutory certification requirements.[10] Cable operators may file petitions for reconsideration of the franchising authority's certification within 30 days from the date such certification becomes effective.[11] Rate regulation is automatically stayed pending review of a timely-filed petition for reconsideration (filed pursuant to Section 76.911 of the Commission's rules) alleging the presence of effective competition.[12]

4. In its original petition for reconsideration, Horizon argued that its Handy Township system was subject to effective competition in its franchise area. Horizon based its claim of effective competition on the allegation that its system's subscriber penetration rate was less than 30% of the "homes" in its franchise area.[13] To support its claim, Horizon submitted a copy of a computer printout which indicated that its system served 274 subscribers as of October 21, 1993. Horizon also provided a copy of 1990 Census data which indicated that there were 1,957 "housing units" within the franchise area. In addition, Horizon also submitted a declaration under penalty of perjury by a responsible official certifying to the accuracy of the subscriber data

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[1] *Horizon Cable I Limited Partnership,* 10 FCC Rcd 77 (1994).

[2] The Township filed its Certification of Franchising Authority to Regulate Basic Cable Service Rates and Initial Finding of Lack of Effective Competition ("FCC Form 328") on September 29, 1993. The certification became effective on October 29, 1993.

[3] Section 1.106 of the Commission's rules provides that oppositions to petitions for reconsideration must be filed within 10 days of the date that the petition for reconsideration was filed.

[4] Communications Act of 1934 § 405, 47 U.S.C. § 405.

[5] Communications Act of 1934 § 405, 47 U.S.C. § 405; 47 C.F.R. § 1.106(f).

[6] 47 C.F.R. § 1.106(d)(1).

[7] 47 C.F.R. § 1.106(d)(2).

[8] Communications Act of 1934 § 623(a)(4), 47 U.S.C. § 543(a)(4).

[9] 47 C.F.R. §§ 76.906, 76.910(b)(4).

[10] 47 C.F.R. § 76.910(e). Certification becomes effective unless the Commission determines that: (1) the franchising authority will not adopt or administer rate regulations that are consistent with the Commission's regulations; (2) the franchising authority lacks the legal authority to adopt, or the personnel to administer, rate regulations; (3) procedural laws and regulations applicable to rate regulation proceedings by the franchising authority do not provide a reasonable opportunity for consideration of the views of interested parties; or (4) the cable system in question is subject to effective competition. 47 C.F.R. § 76.910(b). *See also* Communications Act of 1934 § 623(a)(4), 47 U.S.C. § 543(a)(4).

[11] 47 C.F.R. §§ 1.106, 76.911, *Report and Order and Further Notice of Proposed Rulemaking,* MM Docket No. 92-266, 8 FCC Rcd 5631, 5693 (1993).

[12] 47 C.F.R. § 76.911(c).

[13] The 1992 Cable Act (Communications Act of 1934 § 623(a)(2); 47 U.S.C. § 543(a)(2)) and the Commission's rules (47 C.F.R. § 76.905(a)) provide that only the rates of cable systems that are not subject to effective competition may be regulated. One of the bases on which a cable system is deemed subject to effective competition is if fewer than 30 per cent of the households in the system's franchise area subscribe to the system's service. Communications Act of 1934 § 623(l)(1)(A); 47 U.S.C. § 543(l)(1)(A); 47 C.F.R. § 76.905(b)(1).

included in the petition. Using these figures, Horizon argued that the ratio of total Horizon subscribers in relation to the total number of "housing units" in the franchise area yielded a subscriber penetration rate of 14% of the "households" in its franchise area. Because the penetration rate fell below 30%, Horizon argued that its system was subject to effective competition, and that the Township's certification to regulate Horizon's basic cable rates and associated equipment should be rescinded.

5. In its *Order*, the Bureau denied Horizon's petition for reconsideration because Horizon, in deriving its penetration rate, inappropriately relied upon "housing unit" data, rather than household ("occupied housing unit") data, to determine the total number of households in its franchise area. Specifically, the Bureau found that Horizon's "housing unit" count inappropriately included vacant housing units. Because Horizon failed to base its claim on "household" or "occupied housing unit" data, the Bureau rejected Horizon's claim of effective competition.

6. In its petition, Horizon now argues that use of recently located "household" (occupied housing unit) data confirms that its system's penetration level falls below 30%. Specifically, Horizon submits a copy of the relevant page of 1990 Census data which demonstrates that there are 1,877 occupied housing units in Horizon's franchise area. In addition, Horizon submits updated subscribership data which indicates that Horizon serves a total of 365 subscribers as of January 21, 1995. This yields a penetration level of 19.4%. Horizon argues that the public interest warrants acceptance of this new data because it demonstrates that Horizon is subject to effective competition based on a low penetration level.

II. DISCUSSION

7. Generally, reconsideration is appropriate where the petitioner shows either a material error or omission in the original order or raises additional facts not known or not existing until after the petitioner's last opportunity to present such matters.[14] A petition for reconsideration which relies on facts or information not previously presented to the Commission or its delegated authority may be considered if the Commission or designated authority determines that consideration of such facts is required in the public interest.[15]

8. In its original petition, Horizon based its effective competition claim on housing unit data which inappropriately included vacant housing units. In this petition, however, Horizon now submits household (*i.e.*, occupied housing unit) data in support of its effective competition claim.[16]

9. Relying on this household data, we find that Horizon currently serves 365 subscribers in an area with 1,877 households (*i.e.*, occupied housing units). This yields a penetration level of 19.4%. In light of this, we find that Horizon has submitted sufficient evidence demonstrating that it serves fewer than 30% of the households in its franchise area. Accordingly, its cable system is subject to effective competition and its petition is granted.

III. ORDERING CLAUSES

10. Accordingly, IT IS ORDERED that the petition for reconsideration filed by Horizon Cable I Limited Partnership challenging the certification of Handy Township, Michigan to regulate basic cable rates IS GRANTED.

11. IT IS FURTHER ORDERED that the certification of Handy Township, Michigan to regulate the basic cable rates of Horizon Cable I Limited Partnership IS RESCINDED.

12. This action is taken pursuant to delegated authority pursuant to Section 0.321 of the Commission's rules, 47 C.F.R. § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

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[14] *WWIZ, Inc.*, 37 FCC 685, 686 (1964), *aff'd sub nom. Lorain Journal v. FCC*, 351 F.2d 824 (D.C. Cir. 1965), *cert. denied*, 383 U.S. 967 (1966). *See also* 47 C.F.R. § 1.106(c).

[15] 47 C.F.R. § 1.106(c)(2).

[16] Horizon provides no adequate reason as to why it failed to submit this data in its original petition and thus this pleading properly resembles a petition for revocation. Horizon claims that it had no notice that effective competition claims must be demonstrated by using "household" (*i.e.*, occupied housing unit) data. This argument lacks merit. Both the Cable Act and the Commission's rules require that effective competition be demonstrated based on the number of "households" in the franchise area. Communications Act of 1934 § 623(l)(1), 47 U.S.C. § 543(l)(1); 47 C.F.R. § 76.905 (b). As the Commission stated previously, "we presume that Congress did not intend 'households' to have a different meaning than in the 1990 Census that would include vacant units." *Third Order on Reconsideration*, MM Docket Nos. 92-266 and 92-262, 9 FCC Rcd 4316, 4324 (1994) (*"Third Recon. Order"*). The count of "households" in the 1990 Census reflects only occupied housing units. *See* Bureau of the Census, U.S. Dept. of Commerce, 1990 Census of Population, CP-1-1B, Appendix B at B-8. Nonetheless, we note that Section 623(a)(2) of the Communications Act of 1934, as amended, provides that only the rates of cable systems that are not subject to effective competition may be regulated. Moreover, we note that acceptance of this new data reveals that Horizon's penetration level is substantially below the penetration level needed to become subject to rate regulation. In light of these circumstances, we believe that the public interest requires acceptance of this information.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

HORIZON CABLE I LIMITED PARTNERSHIP

Petition for Reconsideration

of the Cable Services Bureau Order Denying Petition for Reconsideration of Victor Township, Michigan's Certification to Regulate Basic Cable Service Rates (MI1061)

ORDER ON RECONSIDERATION

Adopted: February 9, 1995; Released: February 10, 1995

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. On December 15, 1994, Horizon Cable I Limited Partnership ("Horizon") filed a timely petition requesting reconsideration of a *Memorandum Opinion and Order*[1] (*"Order"*) adopted by the Cable Services Bureau ("the Bureau") pursuant to delegated authority. The *Order* denied Horizon's petition for reconsideration challenging the certification of Victor Township ("the Township") to regulate rates for basic cable service and associated equipment.[2] In its petition, Horizon requests that the Bureau grant its petition for reconsideration, find that Horizon is subject to effective competition and rescind the Township's certification. The Township did not file an opposition to Horizon's December 15, 1994 petition.[3]

II. BACKGROUND

2. Section 405 of the Communications Act of 1934, as amended, allows parties to petition for reconsideration of an order, issued by the Commission or its delegated authority.[4] Such a petition must be filed within 30 days from the date of public notice of that action.[5] To warrant consideration, a petition for reconsideration must state the specific form(s) of relief sought by the petitioner and allege with particularity the respects in which the contested action should be changed.[6] The petition should also cite findings of fact or conclusions that the petitioner believes to be in error, and indicate how the petitioner believes they should be changed.[7]

3. Section 623(a)(4) of the Communications Act of 1934, as amended, allows franchising authorities to become certified to regulate basic cable service rates of cable operators that are not subject to effective competition.[8] For purposes of the initial request for certification, local franchising authorities may rely on a presumption that cable operators within their jurisdiction are not subject to effective competition, unless they have actual knowledge to the contrary.[9] Certification becomes effective 30 days from the date of filing unless the Commission finds that the franchising authority does not meet the statutory certification requirements.[10] Cable operators may file petitions for reconsideration of the franchising authority's certification within 30 days from the date such certification becomes effective.[11] Rate regulation is automatically stayed pending review of a timely-filed petition for reconsideration (filed pursuant to Section 76.911 of the Commission's rules) alleging the presence of effective competition.[12]

4. In its original petition for reconsideration, Horizon argued that its Victor Township system was subject to effective competition in its franchise area. Horizon based its claim of effective competition on the allegation that its system's subscriber penetration rate was less than 30% of the "homes" in its franchise area.[13] To support its claim, Horizon submitted a copy of a computer printout which indicated that its system served 222 subscribers as of October 21, 1993. Horizon also provided a copy of 1990 Census data which indicated that there were 936 "housing units" within the franchise area. In addition, Horizon also submitted a declaration under penalty of perjury by a responsible official certifying to the accuracy of the subscriber data

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[1] *Horizon Cable I Limited Partnership*, 10 FCC Rcd 73 (1994).

[2] The Township filed its Certification of Franchising Authority to Regulate Basic Cable Service Rates and Initial Finding of Lack of Effective Competition ("FCC Form 328") on September 29, 1993. The certification became effective on October 29, 1993.

[3] Section 1.106 of the Commission's rules provides that oppositions to petitions for reconsideration must be filed within 10 days of the date that the petition for reconsideration was filed.

[4] Communications Act of 1934 § 405, 47 U.S.C. § 405.

[5] Communications Act of 1934 § 405, 47 U.S.C. § 405; 47 C.F.R. § 1.106(f).

[6] 47 C.F.R. § 1.106(d)(1).

[7] 47 C.F.R. § 1.106(d)(2).

[8] Communications Act of 1934 § 623(a)(4), 47 U.S.C. § 543(a)(4).

[9] 47 C.F.R. §§ 76.906, 76.910(b)(4).

[10] 47 C.F.R. § 76.910(e). Certification becomes effective unless the Commission determines that: (1) the franchising authority will not adopt or administer rate regulations that are consistent with the Commission's regulations; (2) the franchising authority lacks the legal authority to adopt, or the personnel to administer, rate regulations; (3) procedural laws and regulations applicable to rate regulation proceedings by the franchising authority do not provide a reasonable opportunity for consideration of the views of interested parties; or (4) the cable system in question is subject to effective competition. 47 C.F.R. § 76.910(b). *See also* Communications Act of 1934 § 623(a)(4), 47 U.S.C. § 543(a)(4).

[11] 47 C.F.R. §§ 1.106, 76.911, *Report and Order and Further Notice of Proposed Rulemaking*, MM Docket No. 92-266, 8 FCC Rcd 5631, 5693 (1993).

[12] 47 C.F.R. § 76.911(c).

[13] The 1992 Cable Act (Communications Act of 1934 § 623(a)(2); 47 U.S.C. § 543(a)(2)) and the Commission's rules (47 C.F.R. § 76.905(a)) provide that only the rates of cable systems that are not subject to effective competition may be regulated. One of the bases on which a cable system is deemed subject to effective competition is if fewer than 30 per cent of the households in the system's franchise area subscribe to the system's service. Communications Act of 1934 § 623(l)(1)(A); 47 U.S.C. § 543(l)(1)(A); 47 C.F.R. § 76.905(b)(1).

included in the petition. Using these figures, Horizon argued that the ratio of total Horizon subscribers in relation to the total number of "housing units" in the franchise area yielded a subscriber penetration rate of 23% of the "households" in its franchise area. Because the penetration rate fell below 30%, Horizon argued that its system was subject to effective competition, and that the Township's certification to regulate Horizon's basic cable rates and associated equipment should be rescinded.

5. In its *Order*, the Bureau denied Horizon's petition for reconsideration because Horizon, in deriving its penetration rate, inappropriately relied upon "housing unit" data, rather than household ("occupied housing unit") data, to determine the total number of households in its franchise area. Specifically, the Bureau found that Horizon's "housing unit" count inappropriately included vacant housing units. Because Horizon failed to base its claim on "household" or "occupied housing unit" data, the Bureau rejected Horizon's claim of effective competition.

6. In its petition, Horizon now argues that use of recently located "household" (occupied housing unit) data confirms that its system's penetration level falls below 30%. Specifically, Horizon submits a copy of the relevant page of 1990 Census data which demonstrates that there are 902 occupied housing units in Horizon's franchise area. In addition, Horizon submits updated subscribership data which indicates that Horizon serves a total of 240 subscribers as of January 21, 1995. This yields a penetration level of 26.6%. Horizon argues that the public interest warrants acceptance of this new data because it demonstrates that Horizon is subject to effective competition based on a low penetration level.

II. DISCUSSION

7. Generally, reconsideration is appropriate where the petitioner shows either a material error or omission in the original order or raises additional facts not known or not existing until after the petitioner's last opportunity to present such matters.[14] A petition for reconsideration which relies on facts or information not previously presented to the Commission or its delegated authority may be considered if the Commission or designated authority determines that consideration of such facts is required in the public interest. [15]

8. In its original petition, Horizon based its effective competition claim on housing unit data which inappropriately included vacant housing units. In this petition, however, Horizon now submits household (*i.e.*, occupied housing unit) data in support of its effective competition claim.[16]

9. Relying on this household data, we find that Horizon currently serves 240 subscribers in an area with 902 households (*i.e.*, occupied housing units). This yields a penetration level of 26.6%. In light of this, we find that Horizon has submitted sufficient evidence demonstrating that it serves fewer than 30% of the households in its franchise area. Accordingly, its cable system is subject to effective competition and its petition is granted.

III. ORDERING CLAUSES

10. Accordingly, IT IS ORDERED that the petition for reconsideration filed by Horizon Cable I Limited Partnership challenging the certification of Victor Township, Michigan to regulate basic cable rates IS GRANTED.

11. IT IS FURTHER ORDERED that the certification of Victor Township, Michigan to regulate the basic cable rates of Horizon Cable I Limited Partnership IS RESCINDED.

12. This action is taken pursuant to delegated authority pursuant to Section 0.321 of the Commission's rules, 47 C.F.R. § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

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[14] *WWIZ, Inc.*, 37 FCC 685, 686 (1964), *aff'd sub nom. Lorain Journal v. FCC*, 351 F.2d 824 (D.C. Cir. 1965), *cert. denied*, 383 U.S. 967 (1966). *See also* 47 C.F.R. § 1.106(c).

[15] 47 C.F.R. § 1.106(c)(2).

[16] Horizon provides no adequate reason as to why it failed to submit this data in its original petition and thus this pleading more properly resembles a petition for revocation. Horizon claims that it had no notice that effective competition claims must be demonstrated by using "household" (*i.e.*, occupied housing unit) data. This argument lacks merit. Both the Cable Act and the Commission's rules require that effective competition be demonstrated based on the number of "households" in the franchise area. Communications Act of 1934 § 623(l)(1), 47 U.S.C. § 543(l)(1); 47 C.F.R. § 76.905 (b). As the Commission stated previously, "we presume that Congress did not intend 'households' to have a different meaning than in the 1990 Census that would include vacant units." *Third Order on Reconsideration*, MM Docket Nos. 92-266 and 92-262, 9 FCC Rcd 4316, 4324 (1994) (*"Third Recon. Order"*) . The count of "households" in the 1990 Census reflects only occupied housing units. *See* Bureau of the Census, U.S. Dept. of Commerce, 1990 Census of Population, CP-1-1B, Appendix B at B-8. Nonetheless, we note that Section 623(a)(2) of the Communications Act of 1934, as amended, provides that only the rates of cable systems that are not subject to effective competition may be regulated. Moreover, we note that acceptance of this new data reveals that Horizon's penetration level is substantially below the penetration level needed to become subject to rate regulation. In light of these circumstances, we believe that the public interest requires acceptance of this information.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

New Channels Corporation Oneonta, New York	CUID Nos. NY0230, NY0231, NY0232, NY0233, NY0243, NY0567, NY0626, NY0649, NY0809 and NY1374

Benchmark Filing To Support
Cable Programming Service Price

MEMORANDUM OPINION AND ORDER

Adopted: February 8, 1995; Released: February 10, 1995

By the Chief, Cable Services Bureau:

INTRODUCTION

1. Here we consider complaints about the price NewChannels Corporation ("NewChannels") was charging for its cable programming service ("CPS") tier in CUID Nos. NY0230, NY0231, NY0232, NY0233, NY0243, NY0567, NY0626, NY0649, NY0809, and NY1374. NewChannels has chosen to attempt to justify its price through a benchmark showing on FCC Form 393. This order addresses the reasonableness of NewChannels's price only through May 14, 1994. At a later date we will issue a separate order addressing the reasonableness of the price after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

PROCEDURAL MATTERS

4. The first CPS complaint was completed and served on NewChannels on September 30, 1993.[11] The Commission received the complaint on October 4, 1993.

5. Newchannels attempted to justify its CPS price through FCC Form 393's filed on November 15, 1993 for CUID No. NY0626 and February 10, 1994 for CUID Nos. NY0567, NY0649 and NY0809 and February 14, 1994 for CUID Nos. NY0230, NY0231, NY0232, NY0233, NY0243 and NY1374. NewChannels amended its justifications on July 5, 1994, in response to a Cable Services Bureau Order citing common deficiencies observed in benchmark filings generally,[12]

DISCUSSION

6. NewChannels asserts that its monthly CPS tier price of $10.18 per subscriber is justified by its benchmark filing because its price is equal to the maximum permitted charge of $10.18 as calculated in the filing. Upon review of NewChannels's Form 393, we have found no apparent errors that would require a recalculation of NewChannels's maximum permitted CPS price.

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[1] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent NewChannels has sought to take advantage of the refund deferral period under the *Second Order on Reconsideration*, n.7 *infra*, the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which NewChannels implemented its CPS price under the new regulations. See para. 3, *infra*.

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] *Order* in MM Docket No. 92-266, *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] *Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking*, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (1994) (*"Second Order on Reconsideration"*); 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration* at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration* at 4189, n.195.

[11] The complaint was dated September 30, 1993 and states that it was mailed to NewChannels on that date. NewChannels has not complied with 47 C.F.R. § 76.956(a), which requires it to state when service occurred. Under these circumstances we will consider September 30, 1993 as the service date.

[12] *Cable Operators' Rate Justification Filings*, DA 94-526 (released May 23, 1994).

CONCLUSIONS

7. Upon review of the record herein, we conclude that NewChannels has demonstrated that $10.18 per month (plus franchise fee) was the maximum reasonable CPS tier price for the period January 4, 1994 to May 14, 1994.[13]

8. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the complaints against the cable programming service price charged by NewChannels Corporation in Oneonta, New York, CUID Nos. NY0230, NY0231, NY0232, NY0233, NY0243, NY0567, NY0626, NY0649, NY0809, and NY1374, and all other complaints relating to the same price, ARE DENIED TO THE EXTENT INDICATED HEREIN.

9. IT IS FURTHER ORDERED, that the benchmark filing submitted by NewChannels Corporation in Oneonta, New York, with respect to CUID Nos. NY0230, NY0231, NY0232, NY0233, NY0243, NY0567, NY0626, NY0649, NY0809, NY1374 for the period of January 4, 1994 to May 14, 1994, justifies a maximum price of $10.18 per month (plus franchise fee) for NewChannels Corporation's cable programming service tier.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

[13] This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein. This finding is based solely on the representations of NewChannels listed in paragraph 5, *supra*, and the modifications described in paragraph 6, *supra*. Should information come to our attention that these representations (including representations as to data regarding installations and customer equipment) were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

NewChannels Corporation Malone, New York	CUID Nos. NY0199, NY0200, NY0201, NY0202, NY0203, NY0301, NY0302, NY0303, NY0304, NY0801, NY0885 and NY1627

Benchmark Filing To Support
Cable Programming Service Price

MEMORANDUM OPINION AND ORDER

Adopted: February 8, 1995; Released: February 10, 1995

By the Chief, Cable Services Bureau:

INTRODUCTION

1. Here we consider complaints about the price NewChannels Corporation ("NewChannels") was charging for its cable programming service ("CPS") tier in CUID Nos. NY0199, NY0200, NY0201, NY0202, NY0203, NY0301, NY0302, NY0303, NY0304, NY0801, NY0885 and NY1627. NewChannels has chosen to attempt to justify its price through a benchmark showing on FCC Form 393. This order addresses the reasonableness of NewChannels's price only through May 14, 1994. At a later date we will issue a separate order addressing the reasonableness of the price after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993. [6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series. [10]

PROCEDURAL MATTERS

4. The first CPS complaint was completed and served on NewChannels on December 28, 1993.[11] The Commission received the complaint on January 4, 1994.

5. NewChannels attempted to justify its CPS price through FCC Form 393's filed on February 14, 1994 for CUID Nos. NY0199, NY0201, NY0202, NY0302, NY0304, NY0801, NY0885 and NY1627 and February 15, 1994 for CUID Nos. NY0200, NY0203, NY0301 and NY0303. NewChannels amended its justifications on July 5, 1994, in response to a Cable Services Bureau Order citing common deficiencies observed in benchmark filings generally,[12]

DISCUSSION

6. NewChannels asserts that its monthly CPS tier price of $11.07 per subscriber is justified by its benchmark filing because its price is equal to the maximum permitted charge of $11.07 as calculated in the filing. Upon review of NewChannels's Form 393, we have found no apparent errors that would require a recalculation of NewChannels's maximum permitted CPS price.

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[1] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent NewChannels has sought to take advantage of the refund deferral period under the *Second Order on Reconsideration*, n.7 *infra*, the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which NewChannels implemented its CPS price under the new regulations. See para. 3, *infra*.

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] *Order* in MM Docket No. 92-266, *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] *Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking*, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (1994) (*"Second Order on Reconsideration"*); 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration* at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration* at 4189, n.195.

[11] The complaint was dated December 28, 1993 and states that it was mailed to NewChannels on that date. NewChannels has not complied with 47 C.F.R. § 76.956(a), which requires it to state when service occurred. Under these circumstances we will consider December 28, 1993 as the service date.

[12] *Cable Operators' Rate Justification Filings*, DA 94-526 (released May 23, 1994).

CONCLUSIONS

7. Upon review of the record herein, we conclude that NewChannels has demonstrated that $11.07 per month (plus franchise fee) was the maximum reasonable CPS tier price for the period January 4, 1994 to May 14, 1994.[13]

8. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the complaints against the cable programming service price charged by NewChannels Corporation in Malone, New York, CUID Nos. NY0199, NY0200, NY0201, NY0202, NY0203, NY0301, NY0302, NY0303, NY0304, NY0801, NY0885 and NY1627, and all other complaints relating to the same price, ARE DENIED TO THE EXTENT INDICATED HEREIN.

9. IT IS FURTHER ORDERED, that the benchmark filing submitted by NewChannels Corporation in Malone, New York, with respect to CUID Nos. NY0199, NY0200, NY0201, NY0202, NY0203, NY0301, NY0302, NY0303, NY0304, NY0801, NY0885 and NY1627 for the period of January 4, 1994 to May 14, 1994, justifies a maximum price of $11.07 per month (plus franchise fee) for NewChannels Corporation's cable programming service tier.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

[13] This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein. This finding is based solely on the representations of NewChannels listed in paragraph 5, *supra*, and the modifications described in paragraph 6, *supra*. Should information come to our attention that these representations (including representations as to data regarding installations and customer equipment) were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

CONTINENTAL CABLEVISION OF WESTERN NEW ENGLAND, INC.	East Granby, CT East Windsor, CT Enfield, CT Granby, CT Hartland, CT
Appeal of Local Rate Order of the Connecticut Department of Public Utility Control	Somers, CT Stafford, CT Suffield, CT Union, CT Windsor Locks, CT
Request for Emergency Stay of Local Rate Order of the Connecticut Department of Public Utility Control	

ORDER

Adopted: February 9, 1995; Released: February 10, 1995

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. On September 8, 1994, Continental Cablevision of Western New England, Inc. ("Continental"), filed an Appeal ("Appeal") of a local rate order ("Local Rate Order") of the Connecticut Department of Public Utility Control ("DPUC") for the communities of East Granby, Ct.; East Windsor, Ct.; Enfield, Ct.; Granby, Ct.; Hartland, Ct.; Somers, Ct.; Stafford, Ct.; Suffield, Ct.; Union, Ct.; and Windsor Locks, Ct.[1] On November 4, 1994, Continental also filed a Request for Emergency Stay of the Local Rate Order.[2]

2. In the Local Rate Order, the DPUC established regulated rates for Continental's basic cable service, associated equipment and installations, pursuant to the Cable Television Consumer Protection and Competition Act of 1992.[3] The DPUC also ordered Continental to issue refunds or credits to subscribers for those charges collected between September 1, 1993 and July 14, 1994, which were in excess of Continental's maximum permitted rates.

3. In its Appeal, Continental challenges two portions of the Local Rate Order. First, Continental challenges that portion of the Local Rate Order in which the DPUC reduced Continental's benchmark per channel rate on Line 121 of FCC Form 393 from $0.551, which Continental derived by interpolation from the Commission's benchmark tables, to $0.547, which the DPUC calculated using the Commission's benchmark formula.[4] This change resulted in a reduction of Continental's maximum permitted rate for basic service from $8.55 per month to $8.38 per month. Continental contends that it is entitled to use either the benchmark tables or the benchmark formula to calculate its benchmark per channel rate, and that the DPUC erred when it did not allow Continental to interpolate its per channel rate from the benchmark tables contained in FCC Form 393. Accordingly, Continental requests that the Commission overturn those portions of the Local Rate Order which substitute a "formula" benchmark for an "interpolated" benchmark.

4. Continental also challenges that portion of the Local Rate Order in which the DPUC revised Continental's calculations regarding permissible charges for addressable converters and remote controls. Continental's regulated equipment includes only one type of converter box and one type of remote control. In determining Continental's maximum rate for remote controls, the DPUC divided Continental's total remote control costs, including costs associated with remotes in inventory, by the number of remotes in service and in inventory, rather than simply by the number of remotes in service, as Continental had done in its FCC Form 393. The DPUC made the same revision to Continental's converter box rate calculations. The DPUC's revision resulted in lowering Continental's monthly charges for its remote controls from $0.20 to $0.18, and for its addressable converter from $1.82 to $1.80. Continental contends that the maximum monthly lease rates for its remotes and converters must be calculated by dividing its total costs for each type of equipment by the number of units in service only, not the number of units in service and in inventory.

II. STANDARD OF REVIEW

5. Under the Commission's rules, appeals of franchising authorities' local rate orders are reviewed by the Commission.[5] In ruling on an appeal of a local rate order, the Commission will not conduct a *de novo* review, but instead will sustain the franchising authority's decision as long as

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[1] The DPUC filed an Opposition to Continental's Appeal ("Opposition") on September 22, 1994. Continental filed a Reply to the DPUC's Opposition on September 29, 1994.

[2] As discussed in paragraph 16, *infra* , this Request for Emergency Stay is dismissed as moot in light of the decision on the merits herein.

[3] Under the Cable Television Consumer Protection and Competition Act of 1992, and the Commission's implementing regulations, local franchising authorities may regulate rates for basic cable service, associated equipment, and installations. *See* Cable Television Consumer Protection and Competition Act, Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(b), 47 U.S.C. § 543(b).

[4] As part of the rate review process, Continental submitted an FCC Form 393 ("Determination of Maximum Initial Permitted Rates for Regulated Cable Programming Services and Equipment") to the DPUC on November 15, 1993. Local franchising authorities review the information contained in the FCC Form 393, or its successor forms, in order to determine cable operators' maximum permitted rates for basic service, associated equipment, and installations under the Commission's rate regulations. See *Report and Order and Further Notice of Proposed Rulemaking* in MM Docket 92-266, 8 FCC Rcd 5631, 5770 (1993) (*"Rate Order"*) .

[5] 47 C.F.R. §76.944.

there is a reasonable basis for that decision.[6] Therefore, the Commission will reverse a franchising authority's decision only if it determines that the franchising authority acted unreasonably in applying the Commission's rules in rendering a local rate order.[7] If the Commission reverses a franchising authority's decision, it will not substitute its own decision but instead will remand the issue to the franchising authority with instructions to resolve the case consistent with the Commission's decision on appeal.[8]

III. DISCUSSION

A. Benchmark Calculation

6. The issues raised in Continental's Appeal involve the calculation of its benchmark per channel rate on Line 121 of FCC Form 393, and the calculation of its maximum permitted equipment charges. FCC Form 393 is the official form used by cable operators to determine whether their regulated rates for programming, equipment and installations are reasonable. FCC Form 393 is divided into three (3) separate, but interrelated parts. In Part II, the operator calculates its permitted programming rates, while in Part III, the operator calculates its permitted equipment and installation rates. Part I is a cover sheet that lists the various programming, equipment and installation rates that have been calculated in Parts II and III and compares them to the rates the operator has actually charged during the period under review.

7. The operator's maximum permitted rates are derived by completing Parts II and III of FCC Form 393, pursuant to which the operator calculates the actual aggregate revenues collected by the operator for regulated programming, equipment and installation, as of the initial date of regulation or as of September 30, 1992. After calculating actual aggregate revenues, the operator converts those revenues to a per-channel rate, and then compares the per-channel figures to the applicable benchmark rate. The benchmark rate is determined by use of either the benchmark tables that are part of FCC Form 393 or by use of the benchmark formula.[9] If the appropriate benchmark for a particular operator falls between two numbers listed in the benchmark tables, then the operator may either interpolate the appropriate benchmark number or derive it using the benchmark formula.[10] If the per-channel rate exceeds the benchmark rate, the operator must reduce the per-channel rate to the benchmark rate or by 10%, whichever is less. Maximum permitted rates for equipment and installation are based on actual cost and are calculated in Part III of FCC Form 393.

8. Continental claims that the DPUC unjustifiably substituted its calculation of Continental's benchmark rate using the Commission's formula in place of the benchmark rate which Continental derived by interpolating from the benchmark tables contained in FCC Form 393. The DPUC ordered Continental to issue additional refunds based upon the new, and lower, maximum permitted rate which the DPUC derived from the benchmark formula. The DPUC contends that a cable operator is not automatically entitled to the higher of the two values produced by the two methods of determining the benchmark per channel rate. The DPUC believes that a franchising authority should not be bound by a cable operator's choice of methodology where the calculation of the benchmark rate under the Commission's formula is available, because the formula provides a more precise and consistent regulatory analysis for all cable companies in Connecticut.

9. A cable operator's benchmark per channel rate represents the rate that a comparable cable system that is subject to competition would charge. An operator derives its benchmark per channel rate by using either the benchmark tables in Attachment A to FCC Form 393, or the benchmark formula on page 33 of that form. The benchmark tables set forth various benchmark per channel rates, based upon the number of regulated channels and satellite-delivered signals for an operator's community unit, as well as the number of subscribers on an operator's system. If the appropriate benchmark for a particular operator falls between two numbers listed in the benchmark tables, then the operator may interpolate the appropriate benchmark per channel rate from the data in the benchmark tables. Alternatively, an operator may calculate its benchmark per channel rate by inserting its benchmark data (i.e., the number of regulated channels and satellite-delivered signals for the operator's community unit, and the number of subscribers on an operator's system) into the Commission's benchmark formula.[11]

10. The instructions for completing Line 121 of FCC Form 393, which are found on page 11 of FCC Form 393, explain how an operator must interpolate its correct benchmark per channel rate if the appropriate benchmark for a particular operator falls between two numbers listed in the benchmark tables. These instructions go on to state, "[a]lternatively, you may apply the FCC's benchmark formula to calculate your benchmark rate." Furthermore, the "Instructions for Identifying the Appropriate Benchmark Rate from the Tables in Attachment A" on page 22 of FCC Form 393, state, "[i]f either the total number of channels on the regulated tiers or the total number of satellite channels on those regulated tiers for your community unit does not equal the channels displayed in the selected table, you may determine your benchmark rate per channel by using the Commission's formula, or you can perform one of the following [interpolation] calculations." We find that it is clear from these two separate sets of instructions that cable operators may determine their benchmark per channel rate by employing either the Commission's benchmark formula or by interpolating the correct benchmark ratexfrom the benchmark tables in Attachment A to FCC Form 393.[12] Continental followed the instructions on the Commission's Form 393 when it chose to interpolate its

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[6] *Rate Order* at 5731; *Third Order on Reconsideration* in MM Docket 92-266, 9 FCC Rcd 4316, 4346 (1994).

[7] *Id.*

[8] *Id.*

[9] See discussion at para. 10, *infra*.

[10] *See* FCC Form 393, at 11, 22.

[11] The benchmark formula is as follows: LNP = 2.3509 + 7.3452(RECIPSUB) - 0.8878(LNCHAN) + 0.1006 (LNSAT), where LNP = natural logarithm of the benchmark rate per channel; RECIPSUB = 1/number of households subscribing to the cable system; LNCHAN = natural logarithm of the number of channels in use in all regulated tiers of service; and LNSAT = natural logarithm of the number of satellite-delivered channels in all regulated tiers of service.

[12] *See*, Cablevision Systems of Southern Connecticut, Limited Partnership, DA 95-58 (Cab. Serv. Bur., released January 19, 1995); TCI Cablevision of Central Connecticut, DA 95-59 (Cab. Serv. Bur., released January 19, 1995).

benchmark per channel rate from the benchmark tables. The DPUC's insistence that Continental use the Commission's benchmark formula to calculate its benchmark rate is contrary to the Commission's instructions on FCC Form 393, which provide the operator, not the regulator, with the option of calculating its benchmark rate by using either the benchmark formula or the benchmark tables.[13] Accordingly, we find that the DPUC's decision to substitute its calculation of Continental's benchmark rate using the Commission's formula for Continental's calculation of its benchmark rate, which Continental derived by interpolation from the benchmark tables, was unreasonable. In order to comply with the requirements of FCC Form 393, the DPUC must recalculate Continental's maximum permitted rate for the basic service tier using the value of $0.551 as Continental's benchmark per channel rate on Line 121 of FCC Form 393, and modify its Local Rate Order accordingly.

B. Equipment Price Calculation

11. Continental contends that the DPUC improperly divided Continental's total costs for both remotes and converters by the number of remotes and converters in service and in inventory, rather than just the number of remotes and converters in service, as Continental did in its FCC Form 393 which it submitted to the DPUC. The DPUC's revision reduced Continental's monthly charge for remotes and converters by $.02 each. It is Continental's position that the DPUC's action is inconsistent with Commission authority in the following respects: (1) the DPUC's actions are contrary to the Commission's requirement that units in service be loaded with inventory cost; (2) the DPUC's actions assume that the deployment of more converters increases net revenues and ignores the fact that equipment rates are adjusted annually; (3) in substituting its own guesswork for Continental's undisputed facts, the DPUC deprived Continental of any recovery of costs of inventory, despite having found those inventories to be reasonable;[14] and (4) the DPUC's action ran afoul of repeated assurances by the Commission that operators would not be penalized for growth.[15] As detailed below, resolution of this Appeal rests on the strength of petitioner's first argument.

12. In the Local Rate Order, the DPUC noted that in the annual capital costs columns in Steps C and D of its FCC Form 393, Continental included the capital costs of its remotes and converters that were both in service and in inventory. However, when Continental determined its monthly charges for the leased remotes and converters, its capital costs were divided only by the number of units in service. The DPUC maintained that this treatment would be appropriate if Continental maintained an inventory only for the purpose of promptly replacing units needing repair. However, since Continental's inventory included not only units needed for replacement, but also units needed to satisfy additional customer demand for this equipment, the DPUC modified Continental's remote and converter calculations in order to account for the revenue-generating element of its equipment inventory. The DPUC did this by dividing Continental's total costs for remotes by the number of remotes in service and in inventory. The DPUC made the same modification to Continental's converter box calculations.

13. An operator's monthly lease charge for remotes and converters is designed to recover its actual costs of providing and maintaining the remotes and converters, and includes a reasonable profit.[16] An operator determines its maximum monthly lease charge for remote controls in Step C of FCC Form 393, and for converter boxes in Step D of FCC Form 393. In order to derive its maximum monthly lease charges for remotes and converters, an operator first determines its total costs for each category of equipment by adding together the annual capital costs and the total maintenance/service costs of that particular category of equipment. Then, the operator determines its annual unit cost for that particular type of equipment by dividing the equipment's total costs by the total number of units in service.[17] Finally, the operator derives its maximum monthly rate for each type of equipment by dividing the annual unit cost by 12.

14. The instructions for completing Steps C and D of FCC Form 393 require the operator to list on Lines 12 and 19, respectively, the total number of either remotes or converters that were in service on the last day the operator closed its books.[18] Likewise, the instructions for completing Column I of Schedule C of FCC Form 393 require the operator to enter the total number of units in service for leased remotes and converter boxes.[19] We find that it is clear from these two separate sets of instructions that, in order to calculate their maximum permitted rate for remotes and converters, cable operators should divide the total cost of remotes and converters by the total number of remotes and converters in service (as Continental did), rather than by the number of units both in service and in inventory (as the DPUC did). Continental followed the instructions on the Commission's Form 393 when it calculated its maximum monthly lease rates for both remotes and converters. The DPUC's insistence that Continental determine the total unit cost of its remotes and converters by dividing the total cost of the remotes and converters by the number of remotes and converters in service and in

[13] The DPUC's argument that requiring the use of the benchmark formula in all cases would promote regulatory consistency is unavailing. Arbitrarily requiring the use of interpolation in all cases would just as easily promote such consistency. However, by explicitly giving the operator the right to choose which method to use in calculating the benchmark, the Commission has indicated that the operator's interests in such a choice outweighs the hypothetical advantages of regulatory consistency in this instance.

[14] In the Local Rate Order, the DPUC stated that it considered Continental's inventory level to be reasonable. Local Rate Order, at p. 6.

[15] Appeal, at p. 4 - 5.

[16] FCC Form 393, at p. 27 - 28. *See also, Rate Order,* at 5814 - 5818.

[17] An operator's total equipment costs include the annual capital costs of its equipment. An operator's annual capital costs of equipment include the costs of both units of equipment which are in service and which are in inventory. *See,* FCC Form 393, at pps. 33 -34. Therefore, it is proper for an operator (1) to include the costs of remotes and converters in inventory in its capital cost calculations in Steps C and D of FCC Form 393; and (2) to determine its annual unit cost by dividing the costs of both units in service and in inventory by the number of units in service.

[18] FCC Form 393, at p. 28.

[19] FCC Form 393, at p. 34.

inventory was contrary to the Commission's instructions on FCC Form 393. Accordingly, we find that the DPUC's decision to revise Continental's calculation of its maximum monthly rates for its remotes and converters was unreasonable. In order to comply with the requirements of FCC Form 393, the DPUC must recalculate Continental's maximum permitted monthly rate for both remotes and converters by (1) dividing the total cost of Continental's remote controls (Line 11, FCC Form 393) by the total number of Continental's remote controls which were in service on the last day Continental closed its books prior to submission of its FCC Form 393; (2) dividing the total cost of Continental's converter boxes Line 18, FCC Form 393) by the total number of Continental's converter boxes which were in service on the last day Continental closed its books prior to submission of its FCC Form 393; and (3) dividing both of these numbers by 12. The DPUC then must modify the Local Rate Order accordingly.

IV. ORDERING CLAUSES

15. Accordingly, IT IS ORDERED that the Appeal filed by Continental Cablevision of Western New England, Inc. is REMANDED to the Connecticut Department of Public Utility Control for resolution in accordance with the terms of this Order.

16. IT IS FURTHER ORDERED that, in light of the resolution of its Appeal herein, the Request for Emergency Stay filed by Continental Cablevision of Western New England, Inc. IS DISMISSED as moot.

17. This action is taken by the Chief, Cable Services Bureau, pursuant to authority delegated by Section 0.321 of the Commission's rules. 47 C.F.R. §0.321.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

PP Docket No. 93-253

In the Matter of

Implementation of Section 309(j)
of the Communications Act--
Competitive Bidding

Emergency Motion for Stay of
Telephone Electronics Corporation

ORDER

Adopted: February 9, 1995; Released: February 10, 1995

By the Chief, Wireless Telecommunications Bureau:

1. In an "Emergency Motion for Stay" filed on January 6, 1995, Telephone Electronics Corporation ("TEC") asks the Commission to stay its *Fifth Report and Order*, 9 FCC Rcd 5532 (1994), and *Fifth Memorandum Opinion and Order*, FCC 94-285 (released November 23, 1994), to the extent necessary to enable TEC to participate in the upcoming "entrepreneurs' block" auction for broadband personal communications services ("PCS").[1] At the same time, TEC has petitioned for judicial review of these orders.[2] We conclude that TEC has failed to demonstrate that it would suffer irreparable harm in the absence of a stay. TEC suggests that it would have no opportunity to obtain a broadband PCS license if a stay is not granted because FCC rules preclude TEC from participating in the entrepreneurs' block auction. But those rules also authorize post-auction transactions in which rural telephone companies (such as the six companies comprising TEC) can purchase geographically partitioned licenses from successful auction bidders. *See* 47 C.F.R. § 24.714. Moreover, TEC will have an opportunity to participate in future spectrum auctions that are not governed by the eligibility restrictions TEC challenges in court.[3] By acquiring spectrum blocks in future broadband PCS auctions, for example, TEC could obtain other broadband PCS licenses. Therefore, TEC has failed to demonstrate any irreparable harm that would justify a stay in this proceeding.

2. We further find that grant of TEC's Emergency Motion for Stay would not serve the public interest. The Commission established the entrepreneurs' block auction to fulfill its statutory mandate to ensure economic opportunities for designated entities that had traditionally encountered barriers to entry into the communications industry. The Commission concluded that these designated entities, which had limited access to capital, simply could not outbid larger companies with more substantial resources.[4] If the stay requested by TEC were granted, certain important restrictions imposed by the *Fifth Report and Order* and the *Fifth Memorandum Opinion and Order* would be removed without public notice and an opportunity for public comment, large companies could then participate in the entrepreneurs' block auction, and the entire purpose of creating the entrepreneurs' blocks would be undermined. Such a result would defeat the public interest by thwarting the Commission's efforts to fulfill its Congressional mandate.

3. TEC has failed to make the showings of irreparable harm and public interest that are necessary to justify the extraordinary relief it seeks.[5] For these reasons, TEC's Emergency Motion for Stay is DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Regina M. Keeney, Chief
Wireless Telecommunications Bureau

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[1] The entrepreneurs' block auction for 30 MHz broadband PCS C block licenses is currently scheduled for April 17, 1995, or 30 days after completion of the A and B block auction, whichever is later. Any party who wishes to participate in the C block auction must file with the Commission an FCC Form 175 by February 28, 1995. *FCC Announces Date for First Entrepreneurs' Block Auction*, News Release, December 23, 1994.

[2] *See Telephone Electronics Corporation v. FCC*, No. 95-1015 (D.C. Cir. filed Jan. 6, 1995).

[3] TEC will also have the opportunity to enter into partnership agreements or other joint ventures with the winners of broadband PCS licenses in the ongoing 30 MHz A and B block auctions after the close of that auction.

[4] *See Fifth Report and Order*, 9 FCC Rcd at 5584-88 (¶ ¶ 118-127).

[5] *See Virginia Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921 (D.C. Cir. 1958).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-266

In the Matter of

Implementation of Sections of
the Cable Television Consumer
Protection and Competition
Act of 1992: Rate Regulation

SEVENTH ORDER ON RECONSIDERATION

Adopted: January 5, 1995; Released: January 5, 1995

By the Commission: Commissioner Barrett concurring and issuing a statement.

I. INTRODUCTION

1. In this *Seventh Order on Reconsideration*, the Commission on its own motion reconsiders the provision in its *Sixth Order on Reconsideration, Fifth Report and Order, and Seventh Notice of Proposed Rulemaking* (*"Sixth Reconsideration Order"*) [1] requiring qualifying small systems to choose between (a) the streamlined cost-of-service procedure for recovering the headend costs of new channels that is available only to qualifying small systems and (b) the rate adjustment methodologies that are available to all operators when they add new channels. The Commission also reconsiders whether the streamlined cost-of-service procedure for recovering the headend costs of new channels should be available to qualifying single-tier systems and to qualifying larger systems for which the monthly per subscriber cost of the additional headend equipment necessary to receive an additional channel is one cent or more.

II. SMALL SYSTEM GOING FORWARD METHODOLOGY

A. Background

2. In the *Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking* (*"Fourth Report and Order"*) in this docket,[2] the Commission specified a "going forward" mechanism under which price-capped rates are adjusted for changes in the number of channels offered on the basic service tier ("BST") and on cable programming service tiers ("CPSTs"). Under this mechanism, operators first remove all external costs from the tier charge and then adjust the residual component of the tier charge by a per channel adjustment which declines as the number of channels on the system increases.[3] Operators were also allowed to pass through to subscribers the programming costs associated with new channels as well as a mark- up of 7.5% on new programming expense.[4]

3. In the *Sixth Reconsideration Order*, the Commission, *inter alia*, supplemented its existing going forward rules by creating an alternative channel adjustment methodology. Cable operators adding channels to CPSTs or single-tier systems may recover from subscribers (a) a flat per channel mark-up of up to 20 cents per subscriber per month, subject to a cap on the total amount recovered through December 31, 1997, and (b) programming costs, subject to a cap that applies through December 31, 1996.[5] Operators adding channels to CPSTs or single-tier systems on and after May 15, 1994 may use either the new rules or the existing rules to adjust rates after December 31, 1994, but must use either the existing rules or the new rules consistently with respect to all channels added after December 31, 1994.[6]

4. In the *Sixth Reconsideration Order*, the Commission also adopted a special streamlined cost-of-service procedure that permits independent small systems and small systems owned by small multiple system operators ("MSOs") to recover the costs of upgrading their headend equipment when they add new channels to CPSTs.[7] To prevent the potential for unreasonably sharp rate increases to small system subscribers, the amount a small system can recover for each channel added was limited to programming costs incurred plus the lesser of the actual cost of the headend equipment or $5,000. Headend costs that are to be recovered through increased rates must be depreciated over the useful life of the equipment. In addition, the rate of return the small system may earn on such headend costs may not exceed 11.25%. Small systems that increase rates as a result of any channel additions pursuant to this methodology may be reimbursed for the addition of a maximum of seven channels to CPSTs between May 15, 1994 and December 31, 1997.[8] Qualifying small systems adding channels to CPSTs were allowed to choose between this streamlined cost-of-service procedure and the going forward rules applicable to all systems.[9]

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[1] FCC 94-286, adopted November 10, 1994 and released November 18, 1994, summarized at 59 Fed. Reg. 62,614 (1994). Petitions for reconsideration of the *Sixth Reconsideration Order* must be filed by January 5, 1995 and any such petitions will be considered in a subsequent order.

[2] 9 FCC Rcd 4119 (1994).

[3] *See Fourth Report and Order* at paras. 247-48; 47 C.F.R. § 76.922(e).

[4] *See Fourth Report and Order* at para. 246; 47 C.F.R. § 76.922(d)(3)(xi).

[5] *See Sixth Reconsideration Order* at paras. 64-83 (describing in detail going forward rules).

[6] *Id.*; Letter to Peter H. Feinberg, DA94-1508 (from Chief, Cable Services Bureau, December 19, 1994) (waiver allowing operators to raise rates under the existing going forward rules after December 31, 1994 for channels added by that date, and then adjust rates under the new "going forward" rules for channels added after that date).

[7] *See Sixth Reconsideration Order* at paras. 87-94. A small system is a cable system that serves 1,000 or fewer subscribers from the system's principal headend, including any technically integrated headends and microwave receive sites. *See* 47 C.F.R. § 76.901(c). A small MSO is defined as a MSO that has 250,000 or fewer total subscribers, owns only systems with less than 10,000 subscribers each, and has an average system size of 1,000 or fewer subscribers. *See* 47 C.F.R. § 76.922(b)(5).

[8] *See Sixth Reconsideration Order* at paras. 93-94.

[9] *See id.* at para. 91.

5. In adopting this streamlined cost-of-service procedure for independent small systems and small systems owned by small MSOs, the Commission relied in part on comments filed by the Cable Telecommunications Association ("CATA"), a cable industry trade association.[10] In its comments, CATA suggested that special attention should be paid to small systems because the equipment costs associated with adding channels were fixed and small systems must spread those costs over a small subscriber base.[11] In order to give small systems incentives to add channels, CATA suggested that the Commission adopt a sliding scale that would permit higher rates to be charged for new channels as the subscriber base decreases from 1,000 to 100.[12] According to CATA, typical per channel equipment costs associated with the addition of satellite-delivered channels are $500 to $1,000 for a receiver to convert from satellite frequencies to video baseband, $800 for a descrambler, $1,250 for a signal processor and approximately $2,500 for an additional satellite dish where necessary.[13]

B. Comments

6. Since the *Sixth Reconsideration Order* was released, two industry trade groups have suggested that small systems are denied the incentives necessary for them to add channels to CPSTs by the requirement that they choose between the per channel adjustment of up to 20 cents and the streamlined cost-of-service procedure for upgrading headend equipment.[14] CATA stated that for a 1,000 subscriber system adding a channel at a cost of $5,000 in additional headend equipment, the rate increase to each subscriber per month over the useful life of the equipment would average only $.06 to $.07. It adds that only for systems of 200 to 300 subscribers does the streamlined cost-of-service procedure yield a monthly per subscriber rate increase approaching the 20 cents permitted under the new going forward rules. CATA also states that the streamlined cost-of-service procedure denies even the smallest system any profit for adding a channel.[15] CATA urges that small systems be permitted the same profit as other systems in addition to being able to pass through headend costs.[16] The Small Cable Business Association ("SCBA") argues that the going forward rules are unfair to small systems because "small systems are either prohibited from recovering their headend costs altogether or can elect to recover them with a profit of 11.25% on the hardware, but lose the $.20 per channel" adjustment, while the per channel adjustment of up to 20 cents allows larger systems to "recover all their costs, both hardware *and programming*, and still maintain a mark-up.[17] SCBA asks the Commission to allow operators to recover the cost of additional headend equipment associated with channel additions in addition to the per channel adjustment of up to 20 cents.[18]

7. CATA also argues that the streamlined cost-of-service procedure should be available to all small systems and was improperly limited to independent small systems and small systems owned by small MSOs.[19] SCBA argues that no subscriber cap is necessary because the headend costs quickly decrease to less than one cent per subscriber per month as the size of the system increases.[20]

C. Discussion

8. On our own motion, we find our requirement that qualifying small systems elect between the per channel adjustment methodology and the streamlined cost-of-service procedure for upgrading headend equipment insufficient to give qualifying systems an appropriate incentive to add new channels. Although the return of up to 11.25% on the cost of headend equipment was intended to allow small systems a profit when they added channels, we now believe that our formula as a whole may give such systems an insufficient incentive to add channels. This is the case because, except for very small systems, the per subscriber rate adjustment associated with the streamlined cost-of-service showing would be less than the 20 cents per subscriber per month allowed under our general going forward regulations. If the maximum $5,000 in headend costs is depreciated by a 1,000 subscriber system with an 11.25% rate of return, for example, the monthly per subscriber cost would be just over five cents, assuming a 15 year depreciation period.[21]

9. Accordingly, independent small systems and small systems owned by small MSOs will not be required to choose between the per channel adjustment methodology and the streamlined cost-of-service procedure for upgrading headend equipment. Instead, we will allow independent small systems and small systems owned by small MSOs to recover for each channel added by using both the per channel adjustment methodology and the streamlined cost-of-service procedure for upgrading headend equpipment in the following manner. First, such operators may recover the lesser of the actual cost of the headend equipment or $5,000 associatedwith the channel addition. The recovery of the lesser of the actual cost of the headend equipment or $5,000 shall otherwise remain subject to the conditions set forth in the *Sixth Reconsideration Order*, namely that the headend costs be depreciated over the useful life of the equipment, the rate of return on this investment not exceed 11.25%,[22] and the headend costs may be recovered for

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[10] *See* CATA Comments in MM Docket 92-266 (June 29, 1994).
[11] CATA Comments at 5-7. The Small Cable Business Association ("SCBA") also participated in an ex parte meeting with Commission staff on this issue.
[12] CATA Comments at 5-7.
[13] *Id.* at 6.
[14] *See* CATA Letter to Chairman Hundt, November 23, 1994 ("CATA Letter"); Small Cable Business Association Letter to Chairman Hundt, December 7, 1994 ("SCBA Letter").
[15] CATA Letter at 1-2.
[16] *Id.* at 3.
[17] SCBA Letter at 2-3 (emphasis in original).
[18] *Id.*
[19] CATA Letter at 2.
[20] SCBA Letter at 2.
[21] The Commission has not prescribed depreciation rates for headend equipment, but requires cable operators to follow reasonable depreciation practices in depreciating equipment over its useful life. *See Sixth Reconsideration Order* at para 93 and note 38*. The Cable Services Bureau, acting on delegated authority in examining cost-of-service rate justifications, concluded that operators generally assign 15-year useful lives to headend equipment and adjusted cable operator's proposed useful lives upward to reflect that norm. *See, e.g., In re U.S. Cable Corp.*, DA 94-1145 (adopted by Chief, Cable Services Bureau and released November 9, 1994); *In re United Video Cablevision, Inc.*, DA 94-1144 (adopted by Chief, Cable Services Bureau and released November 9, 1994).
[22] Operators are permitted to recover an 11.25% rate of return on the lesser of the actual cost of the headend equipment

no more than seven channels through December 31, 1997.[23] Second, in addition to recovery of headend upgrade costs in a streamlined cost-of-service proceeding, such operators may make rate adjustments to reflect channel additions and programming expenses that all other operators are permitted to make under the existing going forward rules.[24] Specifically, operators may make per channel adjustments under either the new or the "old" going forward rules.[25] As explained in the *Sixth Reconsideration Order*, operators that elect the new going forward rules are allowed to recover programming expenses associated with adding channels subject to the License Fee Reserve and the Operator's Cap.[26]

10. In addition, we believe that limiting eligibility to use the streamlined cost-of-service procedure for upgrading headend equipment to independent small systems and small systems owned by small MSOs may fail to give slightly larger systems an appropriate incentive to add channels. Accordingly, we have decided to allow larger systems to use the streamlined cost of service approach subject to the same conditions as independent small systems and small systems owned by small MSOs provided that (a) the systems are either independently owned or owned by small MSOs and (b) the monthly per subscriber cost of the additional headend equipment necessary to receive an additional channel is one cent or more.[27] We are providing this relief for systemsp that are slightly larger than those that fall under the definition of a small system because we believe that such operators may have higher than average costs and may not always have access to the financial resources or other purchasing discounts of larger companies. However, since average equipment costs were built into the per channel adjustment of up to 20 cents, we believe that it is unnecessary to allow systems with additional per subscriber headend equipment costs of less than one cent for each channel added to use the streamlined cost-of-service procedure for upgrading headend equipment. We believe that such operators may have sufficient resources to add channels without the additional incentive created by the streamlined cost-of-service procedure. However, we note that we may reconsider this issue in light of the comments we have received in response to our *Fifth Order on Reconsideration and Further Notice of Proposed Rulemaking*. [28] In that notice, the Commission solicited comments on whether it should retain its current definitions of small operators and small systems owned by small MSOs and whether it should employ the current Small Business Administration definition of small cable company. The definitions of these terms in the instant item may be affected by the outcome of the *Further Notice*.

11. In the *Sixth Reconsideration Order*, the Commission provided that rates for the BST will continue to be governed exclusively by our current rules, except that where a system offered only one tier on May 14, 1994, the cable operator will be allowed to use the revised per channel adjustment of up to 20 cents.[29] We did not, however similarly provide that the streamlined cost-of-service procedure for headend upgrades by eligible small systems would be available to operators of single-tier systems.[30] We did not intend to exclude single-tier systems from this procedure and, therefore, on our own motion, we reconsider the limitation of the streamlined cost-of-service procedure for headend upgrades to CPSTs. We conclude that the streamlined cost-of-service procedure should also apply to single-tier systems because we recognize that qualifying systems have the same small customer base over which to spread the cost of new equipment associated with providing additional channels, whether or not they have CPSTs. We also recognize that single-tier systems are commonly smaller systems. Accordingly, we believe that the streamlined cost-of-service procedure for headend upgrades associated with channel additions should apply to single-tier systems as well as CPSTs.

III. REGULATORY FLEXIBILITY ACT ANALYSIS

12. Pursuant to the Regulatory Flexibility Act of 1980, 5 U.S.C. §§ 601-612, the Commission's final analysis with respect to the *Seventh Order on Reconsideration* is as follows:

13. *Need and purpose of this action.* The Commission, in compliance with § 3 of the Cable Television Consumer Protection and Competition Act of 1992, 47 U.S.C. § 543 (1992), pertaining to rate regulation, adopts revised rules and procedures intended to ensure that cable services are offered at reasonable rates with minimum regulatory and administrative burdens on cable entities.

14. *Summary of issues raised by the public in response to the Initial Regulatory Flexibility Analysis.* There were no comments submitted in response to the Initial Regulatory Flexibility Analysis. The Chief Counsel for Advocacy of the United States Small Business Administration (SBA) filed comments in the original rulemaking order. The Commission addressed the concerns raised by the Office of Advocacy in the *Report and Order and Further Notice of Proposed Rulemaking*.[31] Consistent with our rules, the SBA also filed an ex parte letter on August 3, 1994.

15. *Significant alternatives considered and rejected.* In the course of this proceeding, petitioners representing cable interests and franchising authorities submitted several alternatives aimed at minimizing administrative burdens. The Commission has attempted to accommodate the concerns expressed by these parties. In this order, the Commission is providing additional incentives to qualifying small systems to add channels to CPSTs and single-tier systems.

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associated with adding a channel or $5,000. Therefore, if the cost of the headend equipment associated with adding a channel is $5,000 or more, the operator is entitled to recover $5,000 plus an 11.25% rate of return on the $5,000 investment.

[23] *See Sixth Reconsideration Order* at paras. 91-94.

[24] *See* 47 C.F.R. §§ 76.922(d)(3), 76.922(e).

[25] *Id.; see also Sixth Reconsideration Order* at paras. 64-65.

[26] *Id.* at paras. 66-67. Of course, headend costs are not included in the Operator's Cap.

[27] The monthly per subscriber cost of the additional headend equipment necessary to receive the additional channel must be one full cent or more. For this purpose, operators may not round up monthly per subscriber costs of less than one cent. Additionally, operators must depreciate these costs at the same rate as they depreciate all similar equipment.

[28] FCC 94-234, summarized at 59 Fed. Reg. 51,869 (1994), at paras. 9-12.

[29] *Sixth Reconsideration Order* at para. 65.

[30] *Id.* at para. 91.

[31] 8 FCC Rcd 5631 (1993).

IV. PAPERWORK REDUCTION ACT

16. The requirements adopted herein have been analyzed with respect to the Paperwork Reduction Act of 1980 and found not to impose a new or modified information collection requirement on the public.

V. ORDERING CLAUSES

17. Accordingly, IT IS ORDERED that, pursuant to Sections 4(i), 4(j), 303(r), 612, 622(c) and 623 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 303(r), 532, 542(c) and 543, the rules, requirements and policies discussed in this Seventh Order on Reconsideration, ARE ADOPTED and Part 76 of the Commission's rules, 47 C.F.R. Part 76, IS AMENDED as set forth in Appendix C.

18. IT IS FURTHER ORDERED that the Secretary shall send a copy of this Order to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act. Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. §§ 601 *et seq.* (1981).

19. IT IS FURTHER ORDERED that the requirements and regulations established in this decision shall become effective 30 days following publication in the Federal Register.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

APPENDIX A

Title 47, Part 76 of the Code of Federal Regulations is amended as follows:

PART 76 -- CABLE TELEVISION SERVICE

1. The authority citation for Part 76 continues to read as follows:

Authority: Secs. 2, 3, 4, 301, 303, 307, 308, 309, 48 Stat. as amended, 1064, 1065, 1066, 1081, 1082, 1083, 1084, 1085, 1101; 47 U.S.C. Secs. 152, 153, 154, 301, 303, 307, 308, 309, 532, 535, 542, 543, 552 as amended, 106 Stat. 1460.

2. Section 76.922 is amended to revise paragraphs (e)(7) to read as follows:

Section 76.922 Rates for the basic service tier and cable programming service tiers.

* * * * * *

(7) *Headend upgrades.* When adding channels to CPSTs and single-tier systems, cable systems that (a) are either independently owned or owned by small MSOs and incur additional monthly per subscriber headend costs of one full cent or more for an additional channel or (b) are either independently owned or owned by small MSOs as defined in Section 76.922(b)(5), may choose among the methodologies set forth in paragraphs (e)(2) and (e)(3) of this Section. In addition, such systems may increase rates to recover the actual cost of the headend equipment required to add up to seven such channels to CPSTs and single-tier systems, not to exceed $5,000 per additional channel. Rate increases pursuant to this paragraph may occur between January 1, 1995, and December 31, 1997, as a result of additional channels offered on those tiers after May 14, 1994. Headend costs shall be depreciated over the useful life of the headend equipment. The rate of return on this investment shall not exceed 11.25 percent. In order to recover costs for headend equipment pursuant to this paragraph, systems must certify to the Commission their eligibility to use this paragraph, the level of costs they have actually incurred for adding the headend equipment and the depreciation schedule for the equipment.

* * * * *

CONCURRING STATEMENT

OF

COMMISSIONER ANDREW C. BARRETT

Re: In the Matter of Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, Seventh Order on Reconsideration -- MM Docket 92-266 (Small System Going Forward Issues)

By this decision, the Commission provides relief for independent small systems and small systems owned by small multiple system operators by revising its "going forward" rules. These rules were established by the Commission to govern the permitted rate adjustments for the addition of channels on regulated tiers of service. I concur in today's decision.

As you are aware, I strongly opposed the Commission's "going forward" decision.[1] My dissatisfaction with the Commission's going forward methodology was, in large part, founded in the lack of flexibility and certainty for cable operators as they seek to launch programming services and develop service offerings for their systems. Despite these misgivings, I emphasize that my support of today's decision is based on the Commission's acknowledgement that greater flexibility is necessary to make certain that small systems have an incentive to add programming services, and not on any change of opinion with respect to the underlying "going forward" framework.

[1] See, Dissenting Statement of Commissioner Andrew C. Barrett, Sixth Order on Reconsideration, Fifth Report and Order, and Seventh Notice of Proposed Rulemaking, FCC 94-286, adopted November 10, 1994 and released November 18, 1994, summarized at 59 Fed. Reg. 62,614 (1994).

Before the
Federal Communications Commission
Washington, D.C. 20554

ET Docket No. 95-18

In the Matter of

Amendment of Section 2.106 of the Commission's Rules to Allocate Spectrum at 2 GHz for Use by the Mobile-Satellite Service — RM-7927

NOTICE OF PROPOSED RULE MAKING

Adopted: January 30, 1995; Released: January 31, 1995

Comment Date: March 9, 1995
Reply Comment Date: March 27, 1995

By the Commission:

INTRODUCTION

1. By this action, we propose to allocate the 1990-2025 MHz (Earth-to-space) and 2165-2200 MHz (space-to-Earth) bands to the mobile-satellite service (MSS). We propose to allocate these bands for both geostationary (GSO) and non-geostationary (low-Earth orbit, or "LEO") satellites, but also intend to consider whether they should be limited to exclusive GSO or LEO use to promote more efficient spectrum utilization. This action responds to petitions for rule making filed by CELSAT, Inc. (Celsat), TRW, Inc. (TRW), and Personal Communications Satellite Corporation (PCSAT). Moreover, it is consistent with recommendations we expect to make for U.S. proposals to the next World Radiocommunications Conference (WRC) on this topic.[1] This proposed new allocation of spectrum for MSS should create opportunities to provide the public, especially rural Americans, with access to new and competitive services and technologies; stimulate economic development; and, create new high technology jobs in the United States.

BACKGROUND

2. The 1992 World Administrative Radio Conference (WARC-92) allocated the 1970-1980 MHz (Earth-to-space) and 2160-2170 MHz (space-to-Earth) bands in Region 2 and the 1980-2010 MHz (Earth-to-space) and 2170-2200 MHz (space-to-Earth) bands worldwide to MSS.[2] In the June 1994 *Memorandum Opinion and Order* in GEN Docket No. 90-314 (*PCS Reconsideration Order*), we allocated the 1850-1990 MHz band to terrestrial broadband personal communications services (PCS).[3] We anticipate that PCS will use spectrum intensively, thereby bringing into question the feasibility of MSS in this band. Therefore, it does not appear to be practicable to make a domestic allocation of 2 GHz spectrum for MSS that is consistent with the international allocation without jeopardizing the availability of spectrum for PCS. In the *PCS Reconsideration Order*, we recognized the potential value of MSS in areas that may not be readily or economically served by PCS, such as sparsely-populated rural areas.[4] We stated that we intended to initiate a proceeding to investigate possibilities for allocating additional frequencies for MSS at 2 GHz in the near future, and that we would attempt to accommodate MSS within the remaining internationally allocated bands. We also indicated that we intended to pursue additional international allocations for MSS at the 1995 World Radiocommunications Conference (WRC-95).[5]

3. *Celsat Petition* (RM-7927). In February 1992, Celsat filed a petition for rule making which, as amended, requests allocation of the 1970-1990 and 2160-2180 MHz bands for a hybrid GSO/terrestrial personal communications service.[6] Celsat proposes an integrated GSO satellite/terrestrial cellular and micro-cellular mobile service that would use code division multiple access (CDMA) technology.[7] It maintains that this system would have benefits and advantages in cost and overall spectrum efficiency relative to separate PCS and MSS systems. It states that its hybrid MSS service could operate in either a portable (personal) or mobile (vehicular) terrestrial mode, but is primarily a satellite service. Celsat submits that this service will provide important new features, such as position determination, transmissions with data speeds of up to 144 kilobits per second, and compressed video, in addition to conventional mobile voice and messaging. It further states that because its system will cover only the United States it will be relatively simple to coordinate with other nations. Celsat contends that its proposed service would allow direct access to satellite communications through personal handsets. It requests that we allocate the 1970-1990 MHz band for MSS on a co-primary basis with the existing PCS

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[1] *See Second Notice Of Inquiry*, IC Docket No. 94-31, FCC 95-36, released January 31, 1995.

[2] *See Final Acts of the 1992 World Administrative Radio Conference*, Malaga-Torremolinos (1992).

[3] *See* 9 FCC Rcd 5947 (1994).

[4] *Id.*, at para. 94.

[5] *Id.*, at para. 97.

[6] Celsat's original petition requested allocation of the 1610-1626.5 and 2483.5-2500 MHz bands for MSS. In July 1993, Celsat amended its petition to reflect its current request. In conjunction with its petition, Celsat also filed a pioneer's preference request, PP-28. We placed this request on public notice and requested comment on it. In October 1993, we initiated a review of the pioneer's preference rules in ET Docket No. 93-266 to assess the effect on these rule of our authority to assign licenses by competitive bidding, as recently authorized by the Congress. *See Notice of Proposed Rule Making*, ET Docket No. 93-266, 8 FCC Rcd 7692 (1993). In the *First Report and Order* in that proceeding, we deferred a decision as to whether to apply our existing pioneer's preference rules in situations where tentative pioneer's preference decisions have not been issued. *See First Report and Order*, ET Docket No. 93-266, 9 FCC Rcd 605 (1994). Final action in ET Docket No. 93-266 is still pending; therefore, we will continue to defer action on Celsat's pioneer's preference request.

[7] CDMA is a communications technique that utilizes a common channel for communications among multiple users by allocating a specific code to each user. It employs a form of modulation whereby digital information is encoded in an expanded bandwidth format. Several transmissions can occur simultaneously within the same bandwidth with the mutual interference reduced by the unique codes in each transmission. It permits a high degree of energy dispersion in the emitted bandwidth.

allocation in that band to allow PCS handsets to access its proposed MSS facilities. Celsat maintains that it will be able to share spectrum with terrestrial PCS without interference. It also proposes that we require that CDMA be used as the access method for MSS in the 2 GHz bands. Celsat maintains that CDMA is particularly spectrum efficient where multiple entrants are contemplated, because it allows all spectrum sharers equal access to the full band allocation, whereas frequency division multiple access requires each entrant to use a distinct and separate frequency assignment.

4. *TRW Petition.* In December 1993, TRW filed a petition for rule making[8] requesting that we allocate spectrum in the 1970-2010 MHz and 2160-2200 MHz bands for provision of international MSS by satellites in non-geostationary orbits. TRW argues that these bands represent the only frequencies suitable for global MSS voice-grade service via hand-held transceivers that are both allocated internationally for MSS and not applied for in the United States. TRW asserts that there is a vast untapped market for services provided by global MSS systems, and that the allocation it proposes will help ensure the preeminence of the United States satellite industry.[9] TRW proposes a twelve satellite constellation that would provide virtually global coverage. TRW's system would provide communications links between fixed users and mobile users and feature inexpensive, hand-held mobile units.

5. *Personal Communications Satellite Corporation Petition.* In April 1994, PCSAT, a subsidiary of AMSC Subsidiary Corporation, filed a petition for rule making[10] to allocate the 1970-1990 MHz and 2160-2180 MHz bands for a GSO satellite service. PCSAT proposes to build and operate a GSO system compatible with PCS that would provide service to several classes of customers and users in the United States. PCSAT observes that over the last ten years there has been a tremendous growth in the availability and use of wireless services for mobile voice and data communications, but that such services are not available everywhere. It submits that satellite MSS can provide coverage between islands of terrestrially-based services, such as in rural and remote areas; and can provide a nationwide communications system for law enforcement, public safety, and interstate transportation. PCSAT proposes two satellites that would provide coverage to the United States and coastal waters up to 200 miles offshore, Puerto Rico, and the U.S. Virgin Islands.

6. Several of the commenters to the Commission's Notice of Inquiry on preparations for WRC-95 addressed the 2 GHz MSS allocations from the perspective of the international table of frequency allocations. They noted the desirability of finding international allocations that can be implemented in the U.S.[11]

DISCUSSION

7. We continue to believe that a need exists for allocating a substantial amount of spectrum for MSS. There is significant consumer demand for convenient mobile services such as telephone, high-rate data and fax, and video. MSS can provide such communications in remote or rural areas not covered by terrestrially based mobile services, and can provide nationwide public safety coverage. As discussed by petitioners, MSS could satisfy important requirements that cannot be economically satisfied by other means. Further, we believe that use of 2 GHz frequencies can help minimize transmission costs and ensure a relatively low cost service that will be within the economic reach of a large segment of the population. Thus, the proposed allocation of 70 MHz of spectrum to MSS should give the public, especially rural Americans, access to new and competitive services and technologies. In the process of bringing such new uses of the spectrum to market, our proposal will also stimulate economic development and the creation of new jobs in the United States.

8. We believe that any 2 GHz MSS allocation should be as consistent as possible with the WARC-92 worldwide MSS allocation. This will help ensure a truly universal service. We therefore believe that incorporating use of the 1990-2010 MHz and 2170-2200 MHz bands allocated for MSS by WARC-92 is desirable.[12] However, we believe that to provide sufficient capacity in the 2 GHz range to satisfy all MSS demand will require additional spectrum. We note that the only petitioner to propose global MSS coverage at 2 GHz -- TRW -- requests 80 megahertz. Balancing this request against other important demands for 2 GHz spectrum, we propose to allocate 70 megahertz for MSS. In order to provide sufficient spectrum in the lower band without impinging on the 1850-1990 MHz PCS allocation, we propose to allocate 1990-2025 MHz for the Earth-to-space link. In the upper band, we propose to allocate 2165-2200 MHz for the space-to-Earth link.[13]

9. *1990-2025 MHz Band.* The 1990-2025 MHz band is part of the 1990-2110 MHz band that is currently allocated for and used heavily by the broadcast auxiliary services

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[8] In view of the relevance of TRW's petition to the issues addressed in this action we are incorporating it herein without first obtaining public comment. Interested parties may comment on TRW's petition as part of their responses to this Notice of Proposed Rule Making.

[9] TRW also is an applicant for an MSS license in the 1610-1626.5 and 2483.5-2500 MHz bands, as are six other companies, including Celsat and AMSC Subsidiary Corporation (AMSC). *See Report and Order*, ET Docket No. 92-28, 9 FCC Rcd 536 (1994).

[10] As with TRW's petition, we find PCSAT's proposal to be relevant to the issues addressed in this action and therefore are incorporating it in this proceeding without first obtaining public comment. Interested parties may comment on PCSAT's proposal as part of their responses to this Notice of Proposed Rule Making.

[11] In comments to the *Notice of Inquiry*, IC Docket No. 94-31, 9 FCC Rcd 9430 (1994), COMSAT, Iridium, AMSC and Constellation recommended allocations similar or identical to our proposals in this proceeding. They also urged the Commission to take steps that would make these allocations available in the U.S.

[12] We also note that MSS use of both bands was proposed in *ex parte* presentations filed in the broadband PCS proceeding; *see PCS Reconsideration Order, supra*, at paras. 91-97.

[13] Currently, 2165-2170 MHz is allocated internationally for MSS only in Region 2; we intend to pursue an international allocation at WRC-95. We also intend to pursue an international allocation of 2010-2025 MHz at WRC-95.

(BAS). The BAS at 1990-2110 MHz is divided into seven channels[14] that are used for the transmission of television signals from fixed and mobile locations. Applications include electronic news gathering (ENG) mobile units, which transmit television signals to studios; studio-transmitter links, which carry television signals from studios to broadcast antennas; and relay stations, which re-transmit television signals. ENG applications are the predominant use of the 1990-2110 MHz band. We have studied the feasibility of sharing between MSS and BAS at 1990-2025 MHz and have concluded that such sharing is not feasible because of the potential for interference between the two services. Therefore, if we ultimately decide to adopt the proposal advanced herein, it will be necessary to relocate BAS incumbents that use this spectrum. To accommodate these incumbents, we propose to add 35 megahertz of spectrum to the upper end of the BAS band at 2110-2145 MHz, thus providing the BAS service with the same amount of spectrum it currently has.

10. We believe that relocating BAS incumbents at 1990-2025 MHz to 2110-2145 MHz would involve minimal engineering changes to BAS systems because of the proximity of this band to the existing BAS allocation. However, we request comment on this assessment and on the cost of relocation. We propose to require MSS providers to bear the costs associated with relocating the existing BAS operations to the 2110-2145 MHz band. The 2110-2130 MHz portion of the band, however, is currently used by common carrier fixed microwave services, and the 2130-2145 MHz portion is currently used by private fixed microwave services. If sharing between BAS and fixed microwave services in the 2110-2145 MHz band is not workable, which we believe to be the case due to the mobile nature of ENG operations, BAS could use this band only if the fixed microwave services were relocated to another band by MSS providers.

11. We have already provided for reaccommodation of 2 GHz fixed microwave incumbents. Specifically, in our emerging technologies proceeding, we made five higher bands available for use by private and common carrier incumbents now operating at 1850-1990 MHz, 2110-2150 MHz and 2160-2200 MHz.[15] We also decided that the emerging technology service provider must guarantee payment of all relocation expenses, build the new microwave facilities at the relocation frequencies, and demonstrate that the new facilities are comparable to the relocated facilities.[16] We propose to apply our involuntary relocation policy to the additional spectrum addressed in this proceeding (1990-2025 MHz and 2165-2200 MHz). Our policy ensures that all incumbent entities required to relocate their operations would receive equivalent or better facilities at no cost to them. Specifically, we propose that the involuntary relocation provide that:

- All relocation expenses would be paid entirely by the displacing MSS provider. These expenses would include all engineering, equipment, and site costs and FCC fees, as well as any reasonable additional costs.
- Relocation facilities would be fully comparable to those being replaced.
- All activities necessary for placing the new facilities into operation, including engineering and frequency coordination, would be completed before relocation.
- The new communications system would be fully built and tested before the relocation could commence.
- Should the new facilities, within one year, prove not to be equivalent in every respect to the relocated facilities, the displacing MSS provider would pay to move the relocated operation to its original facilities until complete equivalency is attained.

12. We believe that the cost of relocating fixed microwave incumbents at 2110-2145 MHz should be borne by MSS providers. While it might appear costly to require MSS users of the 1990-2025 MHz band to pay for relocating these incumbents in addition to relocating BAS users, the costs of relocating them would be significantly mitigated by the fact that most of the microwave links at 2110-2145 MHz form one-half of a duplex system, with the paired links operating at 2160-2195 MHz. Because we are also proposing to allocate the 2165-2200 MHz band for MSS, MSS providers would be relocating duplex systems from 2115-2150 MHz when they relocate the corresponding paired links at 2165-2200 MHz, thereby largely clearing the 2115-2145 MHz band. Thus, MSS providers would be likely to largely clear fixed microwave incumbents at 2110-2145 MHz irrespective of whether that band is allocated for BAS.

13. We seek comment on our proposals for relocating BAS and fixed microwave incumbents, as well as comment on our tentative conclusions that sharing between MSS and BAS at 1990-2025 MHz or BAS and fixed microwave services at 2110-2145 MHz is not feasible. We also seek comment on any other BAS reaccommodation options, as well as the cost of the respective options. For example, one possibility would be to not provide additional spectrum to BAS, but to require incumbents to adopt more spectrally efficient technology to use the remaining 85 megahertz at 2025-2110 MHz. Alternatively, perhaps BAS operations could be moved over time to a higher frequency band where more spectrally efficient technology could be employed.

14. *2165-2200 MHz Band.* The 2165-2200 MHz band, like the 2110-2145 MHz band, is currently used by common carrier and private fixed microwave services, but has been reserved for services that use emerging technologies. Accordingly, the band is available for MSS; however, as discussed in paragraph 11, *supra*, MSS providers would have to bear the costs of relocating the fixed microwave incumbents in the band.

[14] The first channel has a bandwidth of 18 megahertz, and the other six channels have bandwidths of 17 megahertz each; *i.e.*, BAS Channel A01 occupies 1990-2008 MHz , BAS Channel A02 occupies 2008-2025 MHz, etc. *See* 47 C.F.R. Section 74.602.

[15] *See Second Report and Order*, ET Docket No. 92-9, 8 FCC Rcd 6495 (1993).

[16] *See First Report and Order and Third Notice of Proposed Rule Making*, ET Docket No. 92-9, 7 FCC Rcd 6886 at 6890 (1992).

15. We seek comment on whether 70 megahertz of spectrum is the appropriate amount to reallocate to 2 GHz MSS. One alternative would be to reallocate only the 40 megahertz at 1990-2010 MHz and 2180-2200 MHz that was allocated worldwide at WARC-92 and that remains available for paired use after our PCS allocation, and to defer action on additional spectrum until WRC-95 concludes its deliberations on the appropriate 2 GHz MSS allocation. This approach would have the advantage of comporting with the existing international allocation for worldwide MSS, but might not provide sufficient spectrum to satisfy demand for 2 GHz MSS. Further, while it would use only 20 megahertz of BAS spectrum, it would still impact users on the first two BAS channels and thus create the identical impact on BAS incumbents as our proposal. A second alternative would be to allocate 60 megahertz at 1990-2020 MHz and 2170-2200 MHz. This alternative would be a compromise between our proposal and the first alternative. The second alternative would also impact users on the first two BAS channels, but would be more likely to satisfy 2 GHz MSS demand than the first alternative. However, it might still fall short of satisfying 2 GHz MSS demand, and like our proposal, would be inconsistent with the international MSS allocation in a portion of the lower band.[17] We seek comment on these alternatives.

16. We also seek comment on any other sharing or technical matters that may be pertinent to this proposal. Specifically, we request comment on whether the proposed new MSS bands should be limited to either exclusive GSO or LEO use; on whether minimum geographic coverage requirements or a particular access method, such as CDMA, should be mandated for all MSS licensees; on what power limits should be imposed; on Celsat's proposal to share spectrum with PCS at 1970-1990 MHz in order to provide a hybrid PCS/MSS system; and on whether there is a need to allocate spectrum for feeder links to support 2 GHz MSS.[18] Commenters should specifically discuss the merits and drawbacks of our proposal and any alternatives.

17. Finally, while we are generally deferring consideration of MSS service rules and licensing issues, we wish to give advance notice that we propose to award MSS licenses at 2 GHz by competitive bidding. Section 309(j)(1) and (2) of the Communications Act, as amended,[19] authorizes the Commission to conduct auctions where mutually exclusive applications for initial licenses or construction permits are accepted for filing and where the principal use of the spectrum is reasonably likely to involve compensation from subscribers to the service. While we will, to the extent possible, employ engineering solutions to ensure maximum access to this spectrum, we may have to limit available licenses. We believe that of the options for awarding MSS licenses, competitive bidding best serves the public interest by ensuring that the licenses are awarded to the entities that value them the most highly. We have previously found that we have the authority to award MSS licenses using competitive bidding.[20] Under our proposal, the allocations at 2 GHz would be segmented on a national basis and qualified applicants would be required to apply for a separate license for each segment that they want to use. We specifically propose simultaneous multiple round bidding. Simultaneous multiple round bidding is most likely to generate the most information about license values during the course of the auction and provide bidders with themost flexibility to pursue alternate strategies, and therefore award licenses to those bidders who value them most highly. We seek comment as to whether our proposals for competitive bidding for MSS licenses in the proposed bands are appropriate for awarding licenses.

PROCEDURAL MATTERS

18. *Initial Regulatory Flexibility Analysis.* Pursuant to the Regulatory Flexibility Act of 1980, the Commission finds as follows:

A. Reason for Action: This action is being initiated to allocate spectrum for use by the mobile-satellite service at 2 GHz. We believe that this service can satisfy low-cost voice and data requirements that may not be satisfied by other services.

B. Objective: The objective of this proposal is to provide spectrum for meeting the public's requirements for low-cost MSS voice and data transmission services. We also intend to protect incumbent 2 GHz users. Further, providing for the development of 2 GHz satellite technology in the United States should promote the provision of 2 GHz satellite services by U.S. firms.

C. Legal Basis: The proposed action is authorized by Sections 4(i), 303(c), 303(f), 303(g), 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. Section 154(i), 303(c), 303(f), 303(g), and 303(r). These provisions authorize the Commission to make such rules and regulations as may be necessary to encourage more effective use of radio as is in the public interest.

D. Description, Potential Impact, and Number of Small Entities Affected: This proposal is expected to provide new marketing opportunities for radio manufacturers, some of which may be small businesses. Because this proposal concerns only the allocation of spectrum, and not the licensing of systems or stations, we are unable to quantify other potential effects on small entities. We invite specific comments on this point by interested parties.

E. Reporting, Record Keeping, and other Compliance Requirements: None.

F. Federal Rules That Overlap, Duplicate, or Conflict with this Rule: None.

G. Significant Alternatives: We have herein discussed several alternatives and invited comment on these alternatives.

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[17] *See* note 13, *supra* .

[18] Feeder links interconnect a mobile satellite system with other communications networks or user transceivers by means of one or more central Earth stations.

[19] *See* 47 U.S.C. § 309(j)(1),(2).

[20] *See Report and Order in the Matter of Amendment of the Commission's Rules to Establish Rules and Policies Pertaining to a Mobile Satellite Service in the 1610-1626.5/2483.5-2500 MHz Frequency Bands*, ¶ 64, CC Docket No. 92-166, 9 FCC Rcd. 5936 (1994).

19. *Paperwork Reduction Act.* The proposal contained herein has been analyzed with respect to the Paperwork Reduction Act of 1980 and found to contain no new or modified form, information collection and/or record keeping, labeling, disclosure, or record retention requirements, and will not increase or decrease burden hours imposed on the public.

20. *Ex Parte Presentations and Comments.* The rule making proposals in this *Notice* constitute a non-restricted notice and comment rule making proceeding. *Ex parte* presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in Commission rules. *See generally* 47 C.F.R. §§ 1.1202, 1.1203, and 1.1206(a).

21. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, interested parties may file comments on or before March 9, 1995, and reply comments on or before March 27, 1995. All relevant and timely comment will be considered by the Aomissio Commission before final action is taken in this proceeding. To file formally in this proceeding, participants must file an original and four copies of all comments, reply comments, and supporting comments. If participants want each Commissioner to receive a personal copy of their comments, an original plus nine copies must be filed. Comments and reply comments should be sent to Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center (Room 239) of the Federal Communications Commission, 1919 M. Street, N.W., Washington, D.C. 20554.

22. For further information concerning this rule making contact Sean White at (202) 776-1624, Office of Engineering and Technology, Federal Communications Commission, Washington, D.C. 20554.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

APPENDIX A

Proposed Rules

I. Part 2 of Chapter I of Title 47 of the Code of Federal Regulations is amended as follows:

PART 2 -- FREQUENCY ALLOCATIONS AND RADIO TREATY MATTERS; GENERAL RULES AND REGULATIONS

1. The authority citation for Part 2 is revised to read as follows:

AUTHORITY: Sec. 4, 302, 303, and 307 of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154, 302, 303 and 307, unless otherwise noted.

2. Section 2.106, the Table of Frequency Allocations, is amended as follows:

a. In the 1850-1990 MHz band: remove NG153 from column 5.

§ 2.106 Table of Frequency Allocations

* * * * * * *

International table			United States table		FCC use designators	
Region 1-allocation MHz	Region 2-allocation MHz	Region 3-allocation MHz	Government Allocation MHz	Non-Government Allocation MHz	Rule part(s)	Special-use frequencies
(1)	(2)	(3)	(4)	(5)	(6)	(7)
1710-1930 FIXED. MOBILE. 722 740A 744 745 746 746A	1710-1930 FIXED. MOBILE. 722 740A 744 745 746 746A	1710-1930 FIXED. MOBILE. 722 740A 744 745 746 746A	* * * * *			
1930-1970 FIXED. MOBILE. 746A	1930-1970 FIXED. MOBILE. Mobile-Satellite (Earth-to-space). 746A	1930-1970 FIXED. MOBILE. 746A	1850-1990 746A 746B 746C	1850-1990 FIXED. MOBILE. 746A 746B 746C US331	PERSONAL COMMUNICATIONS SERVICES (24). PRIVATE OPERATIONAL-FIXED MICROWAVE (94). RADIO FREQUENCY DEVICES (15).	
1970-1980 FIXED. MOBILE. 746A	1970-1980 FIXED. MOBILE. MOBILE-SATELLITE (Earth-to-space). 746A 746B 746C	1970-1980 FIXED. MOBILE. 746A				
1980-2010 FIXED. MOBILE. MOBILE-SATELLITE (Earth-to-space). 746A 746B 746C	1980-2010 FIXED. MOBILE. MOBILE-SATELLITE (Earth-to-space). 746A 746B 746C	1980-2010 FIXED. MOBILE. MOBILE-SATELLITE (Earth-to-space). 746A 746B 746C	1990-2025 US111 746A 746B 746C	1990-2025 MOBILE SATELLITE (Earth-to-space). US111 NG*** 746A 746B 746C	SATELLITE COMMUNICATIONS (25).	
2010-2025 FIXED. MOBILE. 746A	2010-2025 FIXED. MOBILE. 746A	2010-2025 FIXED. MOBILE. 746A				
2025-2110 FIXED. MOBILE. 747A	2025-2110 FIXED. MOBILE. 747A	2025-2110 FIXED. MOBILE. 747A	2025-2145	2025-2145 FIXED. MOBILE.	AUXILIARY BROADCAST (74). CABLE TELEVISION (78).	

SPACE RESEARCH (Earth-to-space) (space-to-space). SPACE OPERATION (Earth-to-space) (space-to-space). EARTH EXPLORATION SATELLITE (Earth-to-space) (space-to-space). 750A	SPACE RESEARCH (Earth-to-space) (space-to-space). SPACE OPERATION (Earth-to-space) (space-to-space). EARTH EXPLORATION SATELLITE (Earth-to-space) (space-to-space). 750A	SPACE RESEARCH (Earth-to-space) (space-to-space). SPACE OPERATION (Earth-to-space) (space-to-space). EARTH EXPLORATION SATELLITE (Earth-to-space) (space-to-space). 750A		DOMESTIC PUBLIC FIXED (21). PUBLIC MOBILE (22). PRIVATE OPERATIONAL FIXED MICROWAVE (94).

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International table			United States table		FCC use designators	
			Government	Non-Government		
Region 1-allocation MHz	Region 2-allocation MHz	Region 3-allocation MHz	Allocation MHz	Allocation MHz	Rule part(s)	Special-use frequencies
(1)	(2)	(3)	(4)	(5)	(6)	(7)
2110-2120 FIXED. MOBILE. SPACE RESEARCH (deep space) (Earth-to-space). 746A	2110-2120 FIXED. MOBILE. SPACE RESEARCH (deep space) (Earth-to-space). 746A	2110-2120 FIXED. MOBILE. SPACE RESEARCH (deep space) (Earth-to-space). 746A	US90 US111 US219 US222 US252	US90 US111 US219 US222 US252 NG23 NG118		
2120-2160 FIXED. MOBILE. 746A	2120-2160 FIXED. MOBILE. Mobile-Satellite (space-to-Earth). 746A	2120-2160 FIXED. MOBILE. 746A	2145-2150	2145-2150 FIXED. MOBILE. NG23 NG153	PRIVATE OPERATIONAL FIXED MICROWAVE (94).	EMERGING TECHNOLOGIES
			2150-2160	2150-2160 FIXED. NG23	MULTIPOINT DISTRIBUTION (21). PRIVATE OPERATIONAL-FIXED MICROWAVE (94).	
2160-2170 FIXED. MOBILE. 746A	2160-2170 FIXED. MOBILE. MOBILE-SATELLITE (space-to-Earth). 746A 746B 746C	2160-2170 FIXED. MOBILE. 746A	2160-2165	2160-2165 FIXED. MOBILE. NG23 NG153	DOMESTIC PUBLIC FIXED (21). PUBLIC MOBILE (22).	EMERGING TECHNOLOGIES
2170-2200 FIXED. MOBILE. MOBILE-SATELLITE (apace-to-Earth). 746A 746B 746C	2170-2200 FIXED. MOBILE. MOBILE-SATELLITE (apace-to-Earth). 746A 746B 746C	2170-2200 FIXED. MOBILE. MOBILE-SATELLITE (apace-to-Earth). 746A 746B 746C	2165-2200 746A 746B 746C	2165-2200 MOBILE SATELLITE (space-to-Earth). NG23 NG&&& 746A 746B 746C	SATELLITE COMMUNICATIONS (25).	

* * * * * * *

b. The text of footnotes NG118 and NG153 in the Non-Government footnotes are revised to read as follows:

NON-GOVERNMENT (NG) FOOTNOTES

* * * * *

NG118 In the 2025-2145 MHz band, television translator relay stations may be authorized to use frequencies in this band on a secondary basis to stations operating in accordance with the Table of Frequency Allocations.

* * * * *

NG153 The 2145-2150 MHz and 2160-2165 MHz bands are reserved for future emerging technologies on a co-primary basis with the fixed and mobile services. Allocations to specific services will be made in future proceedings.

* * * * *

c. Add footnote NG156 and NG157 to the Non-Government footnotes to read as follows:

NON-GOVERNMENT (NG) FOOTNOTES

* * * * *

NG156 In the 1990-2025 MHz band, Broadcast Auxiliary Service and Cable Television Service operations will maintain primary status until January 1, 1997. After January 1, 1997, Broadcast Auxiliary Service and Cable Television Remote Pickup Service will maintain primary status until a Mobile Satellite Service licensee requests mandatory relocation of the Broadcast Auxiliary Service and Cable Television Service licensee's operations in this band.

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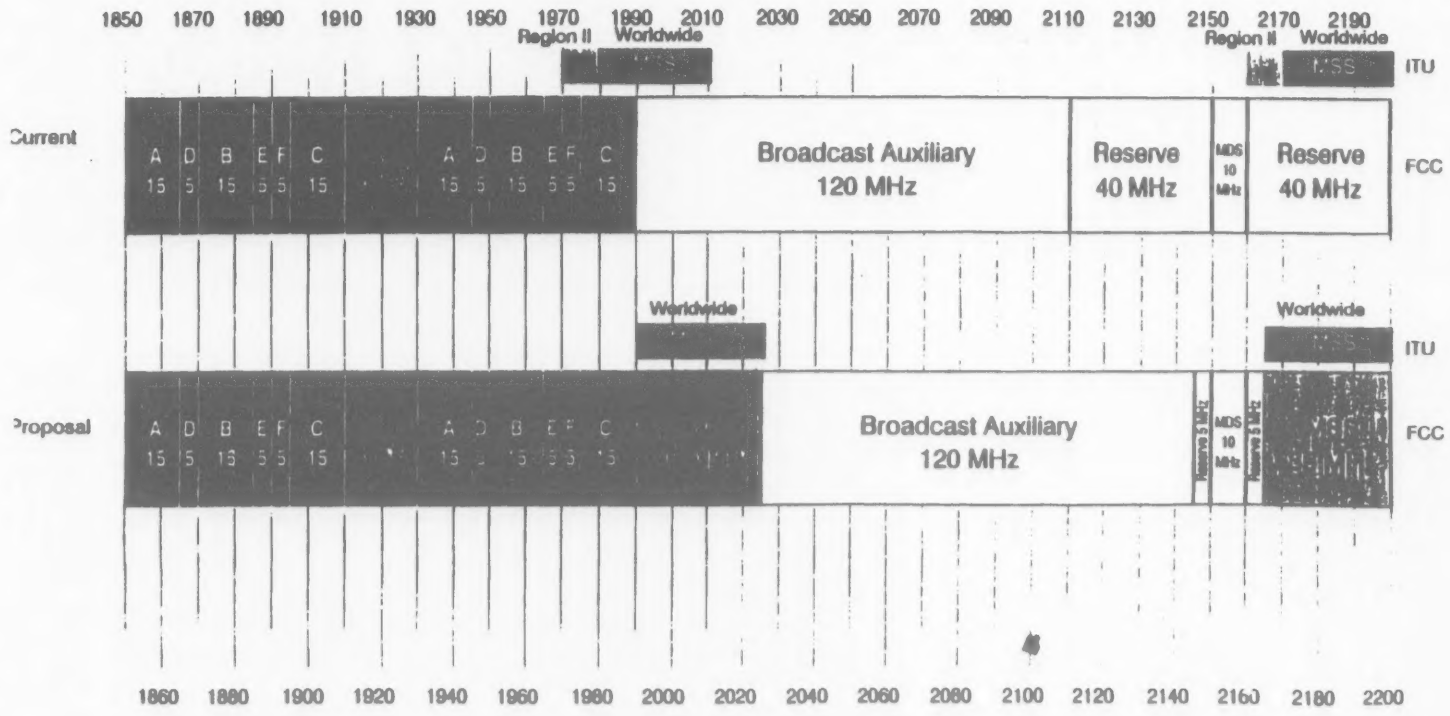
NG157 In the 2165-2200 MHz band, Domestic Public Fixed Service, Private Operational Fixed Microwave Service, and Public Mobile Service operations will maintain primary status until January 1, 1997. After January 1, 1997, these services will maintain primary status unless and until a Mobile Satellite Service licensee requests mandatory relocation of the Domestic Public Fixed Service, Private Operational Fixed Microwave Service, and Public Mobile Service operations in this band.

APPENDIX B

Proposed 2 GHz MSS Plan



Before the
Federal Communications Commission
Washington, D.C. 20554

GC Docket No. 95-21

In the Matter of

Amendment of 47 C.F.R. § 1.1200 *et seq.* Concerning Ex Parte Presentations in Commission Proceedings

NOTICE OF PROPOSED RULEMAKING

Adopted: February 7, 1995; Released: February 7, 1995

Comment Date: March 16, 1995
Reply Date: March 31, 1995

By the Commission: Commissioner Barrett issuing a statement.

I. INTRODUCTION

1. In this *Notice*, we propose to amend the Commission's ex parte rules to make them simpler, clearer, and, in some instances, less restrictive. We propose generally to prohibit ex parte presentations only in proceedings in which such presentations are barred by the Administrative Procedure Act (APA). Ex parte presentations would be permitted in other proceedings but would have to be disclosed in the public record. We also address the question of whether the sunshine period prohibition contained in the ex parte rules should be modified. Finally, we present some miscellaneous proposals for making the ex parte rules more effective.[1] We believe that reform of the ex parte rules will improve the public's ability to communicate with the Commission in a manner that comports with fundamental principles of fairness.

II. BACKGROUND

2. The rules regulating ex parte presentations to the Commission represent an important means for preserving the public's confidence in the integrity of the Commission's processes. They are intended to ensure that the Commission's decisions are based on a publicly available record rather than influenced by off-the-record communications between decision-makers and outside persons. This objective is grounded on basic tenets of fair play and due process. *Amendment of Subpart H, Part 1 of the Commission's Rules and Regulations*, 2 FCC Rcd 3011, 3012 ¶ 5 (1987)

3. To achieve this objective, the Commission, in 1965, adopted rules which established restrictions on ex parte communications in adjudications and certain other proceedings. *Rules Governing Ex Parte Communications*, 1 FCC 2d 49 (1965). Subsequently, in 1980, the Commission adopted disclosure requirements for ex parte communications in informal rulemakings. *Ex Parte Communications Rulemaking Proceedings*, 78 FCC 2d 1384 (1980), *recon. denied*, 93 FCC 2d 1250 (1983). Still later, in 1987, the Commission undertook a sweeping review of those rules. *Amendment of Subpart H, Part 1 of the Commission's Rules and Regulations*, 2 FCC Rcd 3011 (1987), *modified*, 2 FCC Rcd 6053 (1987). That action was intended to simplify the application of the rules, modify them to reflect existing agency practice, and to clarify their scope to eliminate ambiguities. *Id.* at 3011 ¶ 1.[2]

4. The existing rules classify Commission proceedings into three categories: "restricted," "non-restricted," and "exempt." 47 C.F.R. § 1.1200(b). The rules include extensive lists, with various detailed exceptions, regarding how different proceedings are classified. *See* 47 C.F.R. §§ 1.1204(a), 1.1206(b), 1.1208(c). With respect to each category, the rules specify the treatment of ex parte presentations. Ex parte presentations are defined as communications to (or in the case of restricted proceedings also from) decision-making personnel[3] directed to the merits or outcome of a proceeding, which: (1) if written were not served on the parties to the proceeding, and (2) if oral, were made without notice to the parties and without opportunity for them to be present. 47 C.F.R. §§ 1.1202(a),(b).

5. In restricted proceedings, ex parte presentations are generally prohibited.[4] 47 C.F.R. § 1.1208(a). In non-restricted proceedings, ex parte presentations are per-

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[1] Although the notice and comment process is not required for changes in rules of agency practice or procedure, such as the ex parte rules (*see* 5 U.S.C. § 553(b)(A)), we believe that it would be helpful to receive public input before making any major changes in our ex parte rules. We stress, however, that we may adopt proposals different from, or in addition to, those discussed in this *Notice*.

[2] The current rules also reflect several amendments to the rules adopted since 1987. *See Amendment of Subpart H, Part 1 of the Commission's Rules and Regulations*, 3 FCC Rcd 3995 (1988); *Amendment of the Commission's Ex Parte* Rules, 4 FCC Rcd 4716 (1989).

[3] We believe that it is somewhat awkward to define ex parte presentations as being sometimes to decision-makers and sometimes from decision-makers. Accordingly, proposed § 1.1202(b), set forth in Appendix B, eliminates from the definition of "ex parte presentation" the distinction between communications to or from decision-makers. Instead, the rules prescribing the limitations on ex parte presentations stipulate in which direction the limitations apply. Additionally, proposed § 1.1202(c) defines decision-making personnel as generally including Commission personnel who may reasonably be expected to be involved in formulating a decision, and their staff. In this regard, in view of the possibility that staff members might discuss decisions with superiors and coworkers, we find it appropriate to treat the "reasonably be involved" standard expansively. Thus, we would consider a Bureau Chief and all Bureau personnel not part of a separated trial staff or otherwise explicitly excluded as decision-making personnel.

[4] Some ex parte presentations are permissible even in restricted proceedings. Such "exempt" presentations include: (1) presentations authorized by statute or rule; (2) communications with the Office of General Counsel regarding judicial review of a matter that has been decided by the Commission; (3) presentations directly relating to an emergency in which the safety of life is endangered or substantial loss of property is involved; (4) presentations regarding military and foreign affairs and classified security information; (5) presentations involving another

missible, but, in most cases, they must be disclosed. 47 C.F.R. §§1.1206(a). Specifically, written presentations must be filed with the Commission for inclusion in the record.[5] Those making oral presentations must file a memorandum containing any data or arguments not already reflected by that person's written submissions in the proceeding. *Id.* Finally, in exempt proceedings, ex parte presentations generally may be made without limitation. The rules do, however, contain restrictions on ex parte presentations in proceedings that are exempt but whose status could change upon the filing of a formal pleading. *See, e.g.*, 47 C.F.R. §§ 1.1204(a)(2) Note, 1.1204(a)(11) Note, 1.1208(b).

6. The rules impose an additional restriction for matters listed on a "Sunshine Agenda" for consideration at an open Commission meeting. Once a matter has been listed, and until a decision document is released or the matter is otherwise no longer under active consideration (the "Sunshine Agenda period"), no presentations (unless exempt) -- ex parte or otherwise -- may be made to decision-makers. 47 C.F.R. §§ 1.1202(f), 1.1203. There are exceptions to the sunshine period prohibition for Congress and other federal agencies in certain circumstances. Pub. L. No. 100-594, § 7, 102 Stat. 3022 (1988); 47 C.F.R. § 1.1203(c).

7. The rules also provide that information concerning possible violations of the ex parte rules should be referred to the Commission's Managing Director. 47 C.F.R. §§ 1.1212, 1.1214. If the Commission finds a violation of the ex parte rules, a range of sanctions may be applied. Parties to a proceeding who violate the ex parte rules may be required to show cause why their claim or interest in the proceeding should not be adversely affected by the violation.47 C.F.R. § 1.1216. The Commission may also impose forfeitures for violation of the ex parte rules. 47 C.F.R. § 1.80.[6]

8. Based on our experience over the past seven years, we are concerned that the 1987 revision was not entirely successful in its goal of simplifying and clarifying the rules. Moreover, it appears that the existence of persistent questions regarding our rules reflects a need to reexamine their basis and to revisit the underlying issue of the best approach for ensuring the integrity of the Commission's processes. Accordingly, we seek comment on possible approaches to formulating a simpler, more effective set of rules. The following proposals reflect our tentative ideas in this regard.

III. PROPOSALS

9. Our primary proposal relates to the system by which we classify proceedings as restricted, non-restricted, or exempt. In order to reduce the complexity of our rules, it would be helpful to ground them on more clear-cut principles. We would thereby hope to eliminate confusion as to when and whether a particular proceeding is subject to a limitation on ex parte presentations. This would permit the public to anticipate the ex parte status of a proceeding without the need for what can amount to hairsplitting analysis. It would also enhance the perception that the restrictions, when imposed, reflect compelling public interest considerations. A second area of concern involves the sunshine period prohibition. We shall examine whether the sunshine period prohibition should be modified. Lastly, we identify several miscellaneous problem areas and propose solutions.

A. CLASSIFICATION OF PROCEEDINGS

10. The current system of classifying proceedings contains certain inherent complexities. These complexities arise because the current rules attempt to address individually the ex parte status of a large number of different proceedings and situations. Although this approach permits a degree of certainty to persons applying the rules to various situations, it also makes the rules relatively complicated. This complexity raises potentially serious questions. In particular, the need to address so many situations individually may point toward a lack of clarity in the defining principles underlying the rules. Moreover, we can appreciate that the need to parse a complicated set of rules may create uncertainty among persons dealing with the Commission.

11. As an example of this complexity, a person seeking to determine the status of an adjudicative licensing proceeding would discover (after consulting cross-references in 47 C.F.R. §§ 1.1202(d) and 1.1208(c)(1)(ii)) that under 47 C.F.R. § 1.1204(a)(1) such a proceeding is classified as exempt unless it: (1) is formally opposed or involves a formal complaint; (2) involves mutually exclusive applications; or (3) has been designated for hearing. The person would then have to refer to 47 C.F.R. § 1.1208(c)(1) to ascertain that, if any of the preceding events occurs, the proceeding is restricted. In addition, the person would have to refer to 47 C.F.R. § 1.1204(a)(2) Note, and § 1.1208(b) to determine whether ex parte presentations by certain persons may nevertheless be prohibited, although the proceeding is exempt.

12. The complexity of this approach is compounded because the rules refer to a multiplicity of specific types of proceedings. For example, 47 C.F.R. §§ 1.1208(c)(1)(ii)(A) and (B) alone make specific reference to proceedings under 14 different provisions of the Communications Act. Other sections of the ex parte rules also refer to multiple statutory provisions. Moreover, the rules have separate provisions addressing such matters as show cause proceedings, notice of inquiry proceedings, requests for declaratory rulings, Freedom of Information Act requests, tariff investigations, and proceedings before Joint Boards. *See* 47 C.F.R. § § 1.1204 (a) (3), (4), (6), (8); 1.1206 (b) (10); 1.1208 (c) (1) (ii) (D), (c) (4). In addition, in rulemaking orders in various substantive contexts, the Commission has established the ex parte treatment of certain categories of

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branch of the government concerning matters of shared jurisdiction; (6) certain presentations involving frequency coordination committee members; (7) presentations elicited by the Commission's staff, subject to certain service or disclosure requirements; and (8) presentations to or from the Department of Justice or the Federal Trade Commission involving matters which may affect competition in the telecommunications industry, subject to certain exceptions and disclosure requirements. 47 C.F.R. § 1.1204(b).

[5] We consider electronic submissions transmitted in the form of texts, for example, by Internet E-Mail, as "written." *See Public Notice*, DA 94-240 (Gen. Counsel Mar. 16, 1994).

[6] The current rules do not specify the circumstances in which

proceedings.[7] Case law has also interpreted the rules and provided guidance that may not have been apparent from the face of the rules.[8]

13. We believe that a simpler system should be possible and would serve the public interest. A simpler system would permit persons applying the ex parte rules to rely on broad generalizations about how proceedings are treated -- generalizations that arise directly from the public interest rationale for the rules -- rather than having to sift through a minutely detailed classification scheme. Thus, the provisions specifying the scope of restricted, non-restricted, and exempt proceedings should be simpler. At the very least, the rules should not require extensive cross-referencing to pin down the status of a particular proceeding and to determine whether there are any exceptions that affect particular persons regardless of the classification. Additionally, we believe that use of the term "non-restricted" should be avoided altogether, since it misleadingly suggests that no restrictions are applicable. The term "permit-but-disclose" is more descriptive, and we shall adhere to this terminology in this notice.

Proposal: treat as restricted proceedings only those required to be restricted by the APA and those specified as restricted by the Commission on a case-by-case basis.

14. We propose, in the first instance, to follow the APA in defining the situations in which ex parte presentations are totally prohibited. We further believe that, in situations not covered by the APA, a permit-but-disclose rule would generally serve the public interest. Such a rule would allow persons to make ex parte presentations provided that the presentations were disclosed on the public record.

15. By way of background, the APA's restrictions on ex parte presentations are contained in 5 U.S.C. § 557(d). This section codifies Congress' action, in the Government in the Sunshine Act, Pub. L. No. 94-409, § 4, 90 Stat. 1241 (1976), "to provide for the first time a clear, statutory prohibition of ex parte contacts of general applicability." H.R. Rep. No. 880, 94th Cong., 2d Sess. 18, *reprinted in* [1976] U.S. CODE CONG. & ADMIN. NEWS 2183, 2228. Section 557(d) imposes a restriction on ex parte communications only in formal adjudications and rulemakings required to be determined on-the-record after an evidentiary hearing. 5 U.S.C. § 557(a).[9] The section prohibits interested persons outside of the agency from making ex parte communications relevant to the merits of such proceedings to any member of an agency, administrative law judge, or other agency employee who may reasonably be expected to be involved in the decisional process of the proceeding. Ex parte communications from the agency employee to the interested person are also prohibited. 5 U.S.C. § 557(d)(1)(A),(B). The statutory provision further requires that the agency must apply the prohibition no later than the time at which a proceeding is noticed for hearing. 5 U.S.C. § 557(d)(1)(E). Additionally, the prohibition must apply to persons having knowledge that a proceeding will be noticed for hearing. *Id.*

16. With this background in mind, we turn to the question of whether it is necessary or appropriate for us to treat as restricted proceedings other than those covered by § 557(d). We tentatively conclude that we should not treat other proceedings as restricted. Rather, our analysis indicates that, for proceedings not subject to the full panoply of procedural rights applicable to on-the-record proceedings, a permit-but-disclose rule would be appropriate and would serve the public interest.

17. Specifically, our analysis indicates that the legal principles underlying the regulation of ex parte communications do not require a more stringent approach. As courts have observed in dicta, informal contacts between members of the public and an administrative agency are the "bread and butter" of the administrative process and are completely appropriate so long as they do not "frustrate judicial review or raise serious questions of fairness." *Louisiana Association of Independent Producers v. FERC*, 958 F.2d 1101, 1113 (D.C. Cir. 1992).[10]

18. In this regard, the court in *Louisiana Association*, citing to earlier precedents involving informal adjudications and quasi-adjudicatory matters, indicated that ex parte contacts have the potential to frustrate judicial review where they result in "one administrative record for the public and [the reviewing] court and another for the Commission and those 'in the know'." *Id.* at 1112. Additionally, the court explained that ex parte presentations compromise the fairness of a proceeding where they reflect "[s]urreptitious efforts to influence an official charged with the duty of deciding contested issues upon an open record in accord with basic principles of our jurisprudence." *Id.*

19. Similar due process principles have led some courts to conclude that decision-makers should be insulated from ex parte contacts whenever agency action resembles judicial

particular sanctions would be applied. Commenters may wish to propose ways in which the rules could be made more specific in this regard.

[7] *See, e.g., Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992; Rate Regulation, Buy-Through Prohibition*, 9 FCC Rcd 4316, 4342 n.38 (1994) (subsequent history omitted) (appeals to the Commission from local franchising authority cable rate decisions will be treated as restricted proceedings); *Establishment of Procedures to Provide a Preference to Applicants Proposing an Allocation for New Services*, 6 FCC Rcd 3488, 3493 ¶ 42 (1991) (subsequent history omitted) (pioneer's preference requests are treated as restricted proceedings upon the filing of a formal opposition).

[8] *New York Telephone Co.*, 6 FCC Rcd 3303, 3308 n.23 (1991) (subsequent history omitted) (orders to show cause are treated as restricted proceedings upon the filing of a formal opposition to the position of the party against whom the order to show cause is issued).

[9] Consistent with the APA provision, the Communications Act provision restricting ex parte presentations by persons (including Commission personnel) who participated in the presentation of a case also applies after a case has been designated for hearing. 47 U.S.C. § 409(c)(1).

[10] *Louisiana Association* involved the consideration by FERC of numerous applications for gas pipeline certifications. A coalition opposing the certifications complained that FERC decision-makers had ex parte discussions with the proponents of the certifications. The court found that these discussions either did not relate to the merits of the applications or that, to the extent the merits might incidently have been addressed during the discussions, the contents of the discussions were disclosed on the public record. The court held that the discussions did not render the proceedings unfair.

action -- including adjudication and quasi-adjudication[11] among conflicting private claims to a valuable privilege. *Sierra Club v. Costle*, 657 F.2d 298, 400 (D.C. Cir. 1981). *See also Power Authority of the State of New York v. FERC*, 743 F.2d 93, 110 (2d Cir. 1984) (ex parte communications with "a judicial or quasi-judicial body regarding a pending matter are improper and should be discouraged").

20. Despite the unfavorable view of ex parte communications expressed in these cases, we do not believe that we are precluded from adopting a permit-but-disclose rule in adjudicatory proceedings outside the scope of § 557(d). The courts are principally concerned with undisclosed contacts. They have held that not all contacts pose a serious likelihood of affecting the agency's ability to act fairly and impartially in the matter before it. *Power Authority*, 743 F.2d at 110. "In resolving that issue, one must look to the nature of the communications and particularly to whether they contain factual matter or other information outside of the record, which the parties did not have an opportunity to rebut." *Id. See also PATCO v. FLRA*, 685 F.2d547, 564-65 (D.C. Cir. 1982) (in making a fairness determination, it is relevant "whether the contents of the communications were unknown to opposing parties, who therefore had no opportunity to respond").

21. A rule providing for the timely disclosure on the public record of any ex parte presentations in these cases would serve the interests of fairness. It would provide "a reasonable opportunity to know the claims of the opposing party and to meet them." *Morgan v, United States*, 304 U.S. 1, 18-19 (1938). Thus, in *Louisiana Association of Independent Producers v. FERC*, 958 F.2d at 1112, the court held:

> . . . acting upon the chance that the industry representatives were attempting subtly and indirectly to influence the outcome of this [gas pipeline certification] proceeding [during meetings with pipeline proponents], [footnote omitted] the Commission wisely placed summaries of these meetings in record. By doing so, it apprised the petitioners of any argument that may have been presented privately, thereby maintaining the integrity of the process and curing any possible prejudice that the contacts may have caused in this case. [citations omitted]

22. Furthermore, presentations made in good faith pursuant to a permit-but-disclose rule would not involve the type of egregious conduct that has previously evoked condemnation of ex parte communications. A person making communications in the expectation that they would be promptly reflected in the public record would not appear to be seeking "discriminatory and favored treatment," nor would such presentations constitute "surreptitious efforts to influence an official." *See WKAT, Inc. v. FCC*, 296 F.2d 375, 383 (D.C. Cir. 1961) (condemning improper attempts to influence decision-makers). Accordingly, we tentatively find that in adjudicatory-type proceedings outside the scope of § 557(d) a permit-but-disclose requirement would be sufficient to prevent the concerns described by some courts. In other words, persons making presentations concerning such proceedings would either have to serve all parties to the proceeding or disclose the presentations in accordance with the procedures set forth in the rules.

23. We now turn to the separate issue of the considerations governing the treatment of presentations in policy-oriented rulemakings. We believe that in policy-oriented informal rulemakings, a permit-but-disclose rule would be an effective and desirable means of helping to compile a complete record to support our actions. We deem this consideration most relevant because due process issues are generally inapplicable to such rulemakings. *Sierra Club v. Costle*, 657 F.2d at 400; *Action for Children's Television v. FCC*, 546 F.2d 458, 474-77 (D.C. Cir. 1977). *See also Pension Benefit Guaranty Corp. v. LTV Corp.*, 496 (U.S. 633, 653-56 (1990)[12] *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 524 (1978) (when the due process clause is not implicated and an agency's governing statute contains no specific procedural mandates, the APA establishes the maximum procedural requirements a reviewing court may impose). Although we find no statutory or due process requirement for us to report ex parte presentations in policy-oriented informal rulemakings, we believe that disclosure serves to enhance the value of the record. *See* Recommendation 77-3 of the Administrative Conference of the United States (Sept. 15-16, 1977), 1 C.F.R. § 305.77-3 (proposing that permit-but-disclose requirements be applied to informal rulemakings).

24. In exercising our discretion in this regard, we find useful guidance in *Sierra Club, supra*, although we recognize that this case involved a statute inapplicable to the Commission. There, the court held that the EPA had the discretion, consistent with the statute, to determine that oral communications were of "central relevance" to the outcome of a rulemaking and should be placed in the public file. 657 F.2d at 403-04. By central relevance, the court referred to "important communications that may have influenced the agency decisionmaking." *Id.* at 403 n.514. Similarly, with respect to our own processes, we believe that it would be desirable for us to exercise our discretion to ensure that the record contains any potentially important presentations. A permit-but-disclose rule efficiently accomplishes this purpose.

25. Based on the foregoing, we tentatively conclude that we have the authority to apply a permit-but-disclose rule to proceedings not covered by the prohibitions of 5 U.S.C. § 557(d), and we propose to do so.[13] We believe that this approach provides a clear basis for analyzing the ex parte status of different proceedings and will therefore result in rules that are clearer and easier with which to comply. It puts the public on notice that permit-but-disclose is the operative principle whenever a person becomes a "party" to a proceeding unless the full panoply of hearing rights comes into play. Moreover, we believe that this approach serves to eliminate some unnecessary restrictions under the current rules. We see no reason why situations in which a trial-type evidentiary hearing has not been initiated -- such as informal adjudications and proceedings at the pre-des-

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[11] *See Sangamon Valley Television Corp. v. United States*, 269 F.2d 221, 224 (D.C. Cir. 1959) (discussing quasi-adjudication).

[12] In *Pension Benefit*, the Supreme Court clarified *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971), which, the Court held, merely mandates that "an agency take whatever steps it needs to provide an explanation that will enable the court to evaluate the agency's rationale at the time of decision." 110 S. Ct. at 2680. It thus does not establish any specific requirement to disclose ex parte presentations.

[13] As noted in footnote 9, *supra*, the restrictions of 47 U.S.C. § 409(c) as well as those of 5 U.S.C. § 557(d) apply to cases designated for hearing.

ignation stage -- should be treated as restricted. We are concerned that a total prohibition on ex parte presentations under these circumstances might unduly interfere with legitimate communications between the parties and the staff, when these communications -- provided they are disclosed -- pose no real danger of prejudice.

26. We therefore propose revised §§ 1.1204-1.1208, which are set forth in Appendix B to this notice. Under proposed § 1.1208, any matter designated for hearing before an administrative law judge or the full Commission would be restricted with respect to communications both to and by decision-making personnel.[14] In such proceedings, ex parte presentations would be prohibited from the time that a hearing designation order or show cause order is released. The prohibition would also apply to decision-makers or others with knowledge that an order was in preparation. The release of such an order would be an appropriate point of reference for the application of the prohibition, because it directs the compilation of a formal hearing record. *See* 5 U.S.C. § 556(e) (formal hearing record).

27. One situation, however, warrants special treatment. When mutually exclusive applications which are not subject to an auction or lottery are filed, it is very likely that they will ultimately be designated for comparative hearing.[15] Thus, as under our current rules, such proceedings will be treated as restricted upon the filing of mutually exclusive applications not subject to auction or lottery, rather than upon designation for hearing.[16]

28. Additionally, in other specific cases, the Commission, or a Bureau or Office after consultation with the Office of General Counsel, would have an option to find that there is anunreasonable risk that ex parte presentations would be unfair either to interested persons or to the public. Such proceedings would be restricted upon the release of an appropriate order or public notice to that effect.

29. Under proposed § 1.1204, certain matters would be exempt from any ex parte limitations. In our view, these matters do not raise the concerns discussed above justifying a limitation on ex parte presentations. Such matters include notice of inquiry proceedings and, as a general matter, complaint proceedings in which the complainant does not serve the target of the complaint (but not formal complaints filed pursuant to 47 C.F.R. § 1.721).[17] If circumstances warrant, on a case-by-case basis, interested persons would be informed, by order or public notice, that their presentations were subject to permit-but-disclose requirements. Commenters may wish to propose other types of proceedings which should be treated as exempt. For example, under the current rules, tariff proceedings prior to investigation are generally treated as exempt.

30. Under proposed § 1.1206, ex parte presentations in any proceeding not classified as exempt or restricted would generally be subject to permit-but-disclose requirements. We wish to stress that the fact that ex parte presentations are permitted in permit-but-disclose proceedings does not mean that Commission decision-makers are required to meet with parties. Commissioners and Commission staff will continue to have discretion to choose not to meet with parties where they believe that such meetings would not be useful. In addition, Comissioners and Commission staff will retain discretion to choose to meet with one party only if all other parties are present even if this is not required by the rules.

31. "Ex parte presentations" are defined as presentations which are not served on other parties (or, if oral, other parties are not given prior notice and an opportunity to be present). Consequently, it is important to recognize that, even if a proceeding were subject to permit-but-disclose requirements, presentations made by the sole party to a proceeding need not be disclosed under the proposed rule. That is because there would be no other "parties" involved to whom service or notice could be made under the definition of "ex parte presentation." The examples provided in proposed § 1.1206 make this clear. The types of proceedings potentially subject to the disclosure requirement, however, would include all informal adjudicatory proceedings (including applications, waiver requests, requests for declaratory rulings, and other filings seeking affirmative relief) and informal rulemaking matters.

32. In addition, for purposes of application of the permit-but-disclose rule to adjudicatory-type proceedings (including petitions for declaratory ruling), proposed § 1.1202 would define "parties" as the filer initiating an adjudicatory-type proceeding and anyone making a written submission regarding the filing which is served on the filer. Parties would also include other persons formally given that status, such as the subject of an order to show cause proceeding, and persons making written submissions about the party and served on the party. Generally, in complaint proceedings where the complaint is served on the target of the complaint,[18] both the complainant and the target of the complaint are parties. Common carrier complaint proceedings, however, present special issues. As noted, in formal complaint proceedings under 47 C.F.R. § 1.72 1, both the complainant and the carrier would be deemed parties even if the complainant does not serve the carrier. Under the existing ex parte rules, informal common carrier complaint proceedings initiated pursuant to 47 C.F.R. § 1.717 are

[14] Although, consistent with the APA, we will treat all proceedings designated for hearing as restricted, we do not mean to imply that every proceeding which we choose to designate for hearing is required by statute to be heard "on-the-record".

[15] By contrast, applications subject to lottery or auction would not be designated for evidentiary hearing unless questions were raised as to the applicants' basic qualifications. We currently treat auction proceedings as exempt unless they are designated for hearing or involve, for example, waiver requests. *Public Notice*, FCC 94-283 (Nov. 7, 1994). We request comment on whether such proceedings should be treated in the future as exempt or as permit-but-disclose.

[16] We continue to apply, however, certain exemptions that apply under the existing rules to restricted proceedings prior to designation for hearing.

[17] Although the complainant is not required to serve formal complaints filed under 47 C.F.R. § 1.721 (the Bureau transmits the complaint to the carrier), the filing initiates a formal adjudicatory-type section 208 complaint proceeding, which makes it appropriate to apply permit-but-disclose requirements. In contrast, informal common carrier complaint proceedings are initiated pursuant to 47 C.F.R. § 1.717. *See* discussion at paragraph 34, *infra*.

[18] In this context, it would be sufficient to constitute "service" if the complainant sent a courtesy copy of the complaint to its target.

exempt from ex parte restrictions. 47 C.F.R. § 1.1204(a)(5). Under our proposal, informal complaints would be exempt if the complainant did not serve the carrier (even if the Bureau referred the complaint to the carrier). We request comment on whether such informal section 208 complaints, even if served by the complainant on the carrier, should continue to be treated as exempt proceedings.

33. We also emphasize that the proposed definition of "parties" as used in the ex parte rules would not constitute a determination that such persons have satisfied any other legal or procedural requirements, such as the operative requirements for petitions to deny or timeliness requirements otherwise set forth in our rules. Nor would satisfying the definition of a "party" constitute a determination that they have any other procedural rights, such as the right to intervene in hearing proceedings. Rather, the definition would serve the limited purpose of triggering certain ex parte requirements. Moreover, the Commission might well determine that it is appropriate in some circumstances to terminate any requirement that such "parties" have that status under our ex parte rules. For example, if the Commission were to make a formal ruling that a particular "party" is not entitled to participate in a specific Commission proceeding, it might well determine that it is not appropriate to give the person "party" status even for limited purposes of the ex parte rules. We request comment on these proposals. Additionally, in light of our proposal to re-classify certain currently restricted proceedings as permit-but-disclose, we also seek comment on whether any other provisions of the current rules should be modified. *See, e.g.*, §§ 1.1206(a)(3) Note 1, 1.1203(c) Note.

34. The following examples illustrate how the proposed rules would operate. After the filing of an uncontested application, the applicant would be the sole party to the proceeding. The applicant would have no other party to serve with any presentations to the Commission, and such presentations would therefore not be "ex parte presentations" as defined in our rules and would not have to be reported. On the other hand, in the example given, because the applicant is a party, a third person who wished to make a presentation to the Commission concerning the application would either have to serve the applicant or disclose any unserved presentations. Further, once the proceeding involved additional "parties" as defined above (*e.g.*, an opponent of the applicant who served the opposition on the applicant), the applicant and other parties would have to either serve the other or disclose any unserved presentations.

35. In this regard, however, proposed § 1.1204(a)(8)(iii) retains an exception to the disclosure requirement contained in the current rules. At times, the Commission or one of its Bureaus might find it desirable to undertake a formal or informal investigation related, for example, to an application or complaint subject to permit-but-disclose requirements. The purposes of the investigation might be frustrated if information obtained had to be disclosed contemporaneously. Accordingly, the proposed rules provide that decision-makers obtaining information in this manner may dispense with disclosure until an appropriate time if disclosure is necessary. *See Amendment of Subpart H Part I*, 2 FCC Rcd 6053, 6054 ¶ ¶ 10-14 (1987).

36. In rulemakings,[19] the permit-but-disclose requirement would be triggered by the filing of a petition for rulemaking, the release of a notice of proposed rulemaking, a rulemaking order issued without notice and comment (for purposes of subsequent reconsideration or review), or another appropriate order or public notice. Proposed § 1.1202 in effect treats the public as being "parties" to rulemakings.[20] Thus, upon the release or filing of the document triggering the permit-but-disclose requirement in a rulemaking proceeding, all presentations regarding that proceeding would have to be disclosed as provided by the rule.

37. We seek comment on the above proposal. We also invite commenters to suggest any alternative means for simplifying and clarifying the rules. In particular, we are interested in the way other federal agencies, *e.g.*, FTC, FERC, NRC, ICC, handle ex parte presentations and the extent to which their approaches might be workable for the Commission and consistent with relevant case law.

B. SUNSHINE PERIOD PROHIBITION

Request for comment: possible modification of the sunshine period prohibition.

38. The sunshine period prohibition imposes additional restrictions on communications regarding matters pending before the Commission for consideration. The Sunshine Agenda period is defined as beginning with release of a public notice listing a matter for consideration at an open Commission meeting (the Sunshine Agenda) and ending with (1) the release of the text of a decision or order dealing with the matter, (2) issuance of a public notice that the matter has been deleted from the agenda, or (3) issuance of a public notice that the matter has been returned to the staff for further consideration.47 C.F.R. § 1.1202(f). During this entire period, presentations, whether ex parte or not, are prohibited, unless requested by the Commission or its staff or coming within other enumerated exemptions. 47 C.F.R. § 1.1203.

39. Unlike the other provisions of the ex parte rules, the sunshine period prohibition was not adopted primarily as a means of promoting fairness and due process. Rather, the Commission intended to establish a "period of repose" in which it was shielded from last-minute interruptions and other external pressures. By ensuring that Commission decisions were made in an atmosphere of relatively calm deliberation, the Commission sought to make its decisions as objective and well-reasoned as possible and to increase the confidence of the public and the courts in the Commission's work. 2 FCC Rcd at 3020-21 ¶ 72.

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[19] In this regard, we propose to treat Joint Board-related proceedings in the same way as rulemakings.

[20] As a technical matter, rulemakings involve "interested persons" rather than "parties," which is one reason why due process issues are generally inapplicable to rulemakings. *See Sierra Club v. Costle*, 657 F.2d at 400 n.501. *See also* paragraph 25 *supra*. However, in view of our decision to apply a permit-but-disclose rule to both adjudicatory proceedings and policy-oriented rulemaking proceedings, we wish to use a consistent terminology with respect to all proceedings covered by the rule hence, our reference to "parties" to a rulemaking.

40. We seek comments on whether a limited "sunshine period" should also be made applicable to circulation items. As is the case with meeting items, we are concerned that presentations made after an item has been adopted, but before release of the item, may be unduly disruptive. We ask whether we should provide for a "sunshine period" for circulation items commencing with the issuance of a news release announcing Commission action on a circulation item.

41. Additionally, one situation in particular has created a recurring problem in the application of the sunshine period prohibition. It is not uncommon for Commissioners and Commission staff to be present at widely attended meetings or symposia shortly after the adoption of items at an open Commission meeting, yet before the text of the item has been released. If these items have widespread public interest, they may be the subject of speeches or panel discussions. Commission decision-makers may be incidentally present or may even participate as speakers or panelists. Such speeches or panel discussions may technically constitute prohibited presentations in violation of the sunshine period prohibition. To avoid this concern, the Commission must undertake the burdensome process of granting a routine waiver.[21] In many cases, because of this circumstance, the effect is simply to prohibit or restrict Commission participation in such events.

42. The discussion of matters at widely attended events, after the Commission has taken action at an open Commission meeting, does not appear as disruptive as direct contact with the Commission prior to the date of its action. Moreover, attempting to regulate such conduct tends to chill public discussion. We therefore seek comment on a blanket exemption from the sunshine prohibition for presentations occurring under these circumstances.[22]

43. We thus invite comment on whether the sunshine period prohibition should be modified in the manner indicated. Proposed § 1.1203 sets forth our proposals concerning circulation items and widely attended events.

C. MISCELLANEOUS PROPOSALS

Proposal: require more informative notices in permit-but- disclose proceedings.

44. Our experience has given us concern with respect to the disclosure requirement in permit-but-disclose proceedings. Under 47 C.F.R. § 1.1206(a)(2), notifications filed of oral presentations in permit-but-disclose proceedings need only disclose data and arguments not already reflected in that party's earlier submissions in the proceeding. This may result in situations in which persons who believe that their presentations contain no new data or arguments either file no notification or one that is sketchy and unrevealing.

45. Accordingly, proposed § 1.1206(d)(2) would require that notifications should be filed of all oral ex parte presentations in permit-but-disclose proceedings and that all notifications should summarize the entire content of the presentation, even if the data or arguments are not "new." In addition, we propose to make clear that a mere listing of the issues discussed will not suffice. Rather, the content of the position taken on the issues discussed must be disclosed. We believe that this will result in more fairness to the parties as well as a more useful and complete record in the proceeding. Proposed § 1.1206(d)(2) also provides that if the Commission employees involved in an oral ex parte presentation believe that the summary in the notification is deficient they may request the filing of a supplemental notification or prepare a memorandum of the presentation themselves. In order to make it easier to comply with the requirement for a more detailed summary, we also believe that it may be appropriate to relax the requirement that the notification be filed the same day as the oral presentation. We propose that notifications should be filed within three days of the presentation.

Proposal: duty to bring ex parte questions to the Commission's attention.

46. We are concerned that cases may arise in which improper presentations occur because a person privately resolves doubts about the propriety of a presentation without alerting the staff and it is ultimately concluded that the person's rationale is erroneous.

47. To remedy this situation, proposed § 1.1214(b) provides that persons with reason to believe that a situation raises an ex parte question have a duty to alert the Office of General Counsel of this circumstance before engaging in ex parte contacts. The willful failure to bring questionable circumstances to the attention of the Commission's staff could be grounds for the imposition of a forfeiture or other sanction against a party or its counsel.[23] This proposal should encourage parties and counsel to exercise greater care before deciding to engage in questionable conduct. As an alternative or additional matter, commenters may wish to address whether persons proposing to make an ex parte presentation in questionable circumstances should be required to disclose to the intended recipient of the presentation why it is permissible under the rules. Proposal: delegate to the Office of General Counsel additional authority with respect to ex parte matters.

48. The current rules provide that information concerning possible ex parte violations should be referred to the Managing Director for further action.47 C.F.R. §§ 1.1212, 1.1214. On reflection, this responsibility would seem more appropriate for the Office of General Counsel, as the Commission's principal legal office. Indeed, the rules already provide that inquiries concerning the propriety of ex parte communications should be directed to the Office of General Counsel. 47 C.F.R. § 1.1200 Note. Moreover, as a practical matter, the Office of Managing Director routinely consults with the Office of General Counsel before exercising its responsibilities under these sections. We therefore propose to transfer responsibility for handling matters involving alleged ex parte violations under 47 C.F.R. §§ 1.1212 and 1.1214, except for placing relevant material in the public record, from the Managing Director to the Office of General Counsel.

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[21] *See, e.g., Partial Waiver of the Sunshine Prohibition*, 8 FCC Rcd 7332 (1993); 7 FCC Rcd 8603 (1992).

[22] Indeed, it seems questionable to regard presentations made during speeches at which Commission decision-makers incidentally happen to be present as being made "to decision-making personnel." Thus, commenters may wish to address the extent to which presentations made under these circumstances should be exempt from limitations on ex parte presentations generally.

[23] This proposal codifies the policy enunciated in *Rainbow Broadcasting Co.*, 9 FCC Rcd 2839, 2846 ¶ 35 & n.34 (1994).

Proposed Clarifications

49. In addition to the substantive changes discussed above, the proposed rules set forth in Appendix B reflect stylistic and minor organizational changes to clarify the rules.

IV. CONCLUSION

50. We seek comments on the above proposals and invite commenters to submit any other proposals they may have for making the ex parte rules simpler and more effective.

V. PROCEDURAL MATTERS

A. Ex Parte Rules -- Non-restricted Proceeding

51. This is a non-restricted notice-and-comment rulemaking proceeding. Ex parte presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in 47 C.F.R. § 1.1206(a).

B. Regulatory Flexibility Act

52. An Initial Regulatory Flexibility Analysis is contained in Appendix A to this notice.

Authority

53. Authority for this rulemaking action is contained in 47 U.S.C. §§ 154(i), 154(j), 303(r), 403.

VI. ORDERING CLAUSES

54. ACCORDINGLY, IT IS ORDERED, That NOTICE IS HEREBY GIVEN of the proposed regulatory changes described above, and that COMMENT IS SOUGHT on these proposals.

55. IT IS FURTHER ORDERED, That pursuant to applicable procedures set forth in 47 C.F.R. §§ 1.415 and 1.419, comments SHALL BE FILED on or before 30 days from release date **March 16, 1995** and reply comments SHALL BE FILED on or before **March 31, 1995**. To file formally in this proceeding, commenters must file an original and four copies of all comments, reply comments, and supporting comments. If commenters want each Commissioner to receive a personal copy of their comments, they must file an original plus nine copies. Comments and reply comments should be sent to Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. In addition, commenters should file a copy of any such pleadings with the Office of General Counsel, Room 610, 1919 M Street, N.W., Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center, Room 239, 1919 M Street, N.W., Washington, D.C. 20554. Copies of filings may be purchased from the Commission's copy contractor, International Transcription Service, Suite 140, 2100 M Street, N.W., Washington, D.C. 20037, telephone (202) 857-3800.

56. For further information, contact David S. Senzel, (202) 418-1760, Office of General Counsel.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

APPENDIX A

INITIAL REGULATORY FLEXIBILITY ACT ANALYSIS

Reason for Action

The Commission has determined that the rules governing ex parte communications in Commission proceedings should be made simpler, clearer, and less restrictive. The Commission finds it appropriate to reexamine the public interest basis for the limitations on ex parte communications.

Objective

The Commission seeks to simplify and clarify the rules governing ex parte communications in Commission proceedings and to make the rules more consistent with the needs of administrative practice.

Legal Basis

Action is being taken pursuant to 47 U.S.C. §§ 154(i) and (j), 303(r), 403.

Reporting, Record Keeping and Other Compliance Requirements

This proposal would modify the requirement to report ex parte presentations in order to increase the usefulness and value of the reports and to eliminate unnecessary restrictions on ex parte presentations.

Federal Rules which Overlap, Duplicate or Conflict with the Proposed Rules

None.

Description, Potential Impact, and Number of Small Entities Affected

Small entities participating in Commission proceedings would be subject to limitations on ex parte presentations.

Any Significant Alternative Minimizing Impact on Small Entities and Consistent with the Stated Objections

None.

APPENDIX B

Part I of Title 47 of the Code of Federal Regulations is amended to read as follows:

1. The authority citation for Part I continues to read as follows:

AUTHORITY: Secs. 4, 303, 409, 48 Stat. 1066, 1082, 1096, as amended; 47 U.S.C. 154, 303, 409.

2. Section 1.1200 is amended by revising paragraph (a) and deleting paragraph (b) to read as follows:

§ 1.1200 Introduction.

(a) *Purpose.* To ensure the fairness and integrity of its decision-making, the Commission has prescribed rules to regulate ex parte communications. These rules specify "exempt" proceedings, in which ex parte presentations may be freely made (§ 1.1204), "permit-but-disclose" proceedings, in which ex parte presentations are permissible but subject to certain disclosure requirements (§ 1.1206), and "restricted" proceedings in which ex parte presentations are generally prohibited (§ 1.1208). In all proceedings, certain periods ("the Sunshine Agenda or circulation period") are designated in which all communications with Commission decision-making personnel are prohibited (§ 1.1203). The limitations on ex parte presentations described above are subject to certain general exceptions set forth in § 1.1204. Where the public interest so requires in a particular proceeding, the Commission retains the discretion to modify the limitations on ex parte communications. Unless otherwise ordered by the Commission, Joint Boards may modify the ex parte rules in proceedings before them.

Note: * * * *

3. Section 1.1202 is amended by revising paragraphs (a), (b), (c), and (d) and deleting paragraphs (e) and (f) to read as follows:

§ 1.1202 Definitions.

For the purposes of this subpart, the following definitions apply:

(a) *Presentation.* A communication directed to the merits or outcome of a proceeding. Excluded from this term are communications which are inadvertently or casually made, and inquiries relating solely to the status of a proceeding, including inquiries as to the approximate time that action in a proceeding may be taken. However, a status inquiry which states or implies a view as to the merits or outcome of the proceeding or a preference for a particular party, which states why timing is important to a particular party or indicates a view as to the date by which a proceeding should be resolved, or which otherwise is intended to address the merits or outcome or to influence the timing of a proceeding is a presentation.

Note: A communication expressing concern about administrative delay or expressing concern that a proceeding be resolved expeditiously will be treated as a status inquiry so long as no reason is given as to why the proceeding should be expedited other than the need to resolve administrative delay.

(b) *Ex parte presentations.* Any presentation which:

(1) if written, is not served on the parties to the proceeding; or

(2) if oral, is made without advance notice to the parties and without opportunity for them to be present.

Note: Written communications include electronic submissions transmitted in the form of texts, such as by Internet E-Mail.

(c) *Decision-making personnel.* Any member, officer, or employee of the Commission who is or may reasonably be expected to be involved in formulating a decision, rule, or order in a proceeding. Any person who has been made a party to a proceeding or who otherwise has been excluded from the decisional process shall not be treated as a decisional-maker with respect to that proceeding. Thus, any person designated as part of a separate trial staff shall not be considered a decision-making person in the designated proceeding. Unseparated Bureau or Office staff shall be considered decision-making personnel with respect to decisions, rules, and order in which their Bureau or Office participates in enacting, preparing, or reviewing.

(d) *Parties.* Unless otherwise ordered by the Commission, in a proceeding other than a rulemaking, the following persons are parties:

(1) any person who files an application, waiver request, request for a declaratory ruling, or other filing seeking affirmative relief (including a Freedom of Information Act request), and any person making a written submission regarding such filing which is served on the filer;

(2) any person who files a complaint which is served on the subject of the complaint or which is a formal complaint under 47 U.S.C. § 208, and the person who is the subject of the complaint; and

(3) the subject of an order to show cause, notice of apparent liablity, notice of license modification, or similar notice or order, or tariff proceeding, or any other person who has otherwise been given formal party status in a proceeding. Note: In a rulemaking proceeding or a proceeding before a Joint Board or before the Commission to consider the recommendation of a Joint Board, it is presumed for purposes of this subpart that all members of the public are parties.

Note: The fact that a person is deemed a party for purposes of this subpart does not constitute a determination that such person has satisfied any other legal or procedural requirements, such as the operative requirements for petitions to deny or timeliness requirements otherwise set forth in the rules. Nor does it constitute a determination that such person has any other procedural rights, such as the right to intervene in hearing proceedings. The Commission may also determine in particular instances that persons who qualify as "parties" under § 1.1202(d) should not be deemed parties for purposes of this subpart.

4. Section 1.1203 is amended by revising paragraphs (a) and (b) and deleting paragraph (c) to read as follows:

§ 1.1203 Sunshine and circulation period prohibition.

(a) With respect to any Commission proceeding, all presentations to decision-makers concerning matters listed on a Sunshine Agenda or being considered on circulation, whether ex parte or not, are prohibited during the period prescribed in subsection (b) unless:

(1) The presentation is exempt under § 1.1204(a);

(2) The presentation relates to settlement negotiations and otherwise complies with any ex parte restrictions in this subpart;

(3) The presentation is made by a member of Congress or his or her staff, or by other agencies or branches of the federal government or their staffs in a proceeding exempt under § 1.1204 or subject to permit-but-disclose requirements under § 1.1206. If the presentation is of substantial significance and clearly intended to affect the ultimate decision, the presentation (or, if oral, a summary of the presentation) must be placed in the record of the proceeding by Commission staff or in accordance with the procedures set forth in § 1.1206(d); or

(4) The presentation occurs in the course of a widely-attended speech or panel discussion and concerns a Commission action that has been adopted.

(b) The prohibition set forth in subsection (a) applies during the following time period:

(1) For items listed for consideration on a Sunshine Agenda, from the release of a public notice that a matter has been placed on the Sunshine Agenda until the Commission:

(i) Releases the text of a decision or order relating to the matter,

(ii) Issues a public notice stating that the matter has been deleted from the Sunshine Agenda, or

(iii) Issues a public notice stating that the matter has been returned to the staff for further consideration, whichever occurs first.

(2) For items considered on circulation, from the time the Commission issues a news release indicating that it has adopted a decision or order relating to the matter, until the Commission releases the text of the decision or order.

5. Section 1.1204 is amended by revising paragraphs (a) and (b) to read as follows:

§ 1.1204 Exempt ex parte presentations.

(a) The following types of presentations are exempt from the prohibitions in restricted proceedings (§ 1.1208), the disclosure requirements in permit-but-disclose proceedings (§ 1.1206), and the prohibitions during the Sunshine Agenda and circulation period prohibition (§ 1.1203):

(1) The presentation is authorized by statute or by the Commission's rules, *see, e.g.*, §§ 1.333(d), 1.415;

(2) The presentation is made by or to the General Counsel and his or her staff and concerns judicial review of a matter that has been decided by the Commission;

(3) The presentation directly relates to an emergency in which the safety of life is endangered or substantial loss of property is threatened, provided that, if the presentation is oral, a written summary of the presentation shall be filed within a reasonable time thereafter;

(4) The presentation involves a military of foreign affairs function of the United States or classified security information;

(5) The presentation is to or from an agency or branch of the Federal Government or its staff and involves a matter over which that agency or branch and the Commission share jurisdiction;

(6) The presentation is to or from the United States Department of Justice or Federal Trade Commission and involves a telecommunications competition matter in a proceeding which has not been designated for hearing and in which the relevant agency is not a party;

(7) The presentation is between Commission staff and an advisory coordinating committee member with respect to the coordination of frequency assignments to stations in the private land mobile services or fixed services as authorized by 47 U.S.C. § 331;

(8) The presentation is requested by the Commission or staff for the clarification or adduction of evidence, subject to the following limitations:

(i) this exemption does not apply to restricted proceedings designated for hearing;

(ii) in other restricted proceedings, any written presentation solicited upon such request or a summary of any oral presentation solicited upon such request shall promptly be served by the person making the presentation on the other parties to the proceeding. The Commission or its staff may waive the service requirement if service would be too burdensome because the parties are numerous or because the materials relating to such presentation are voluminous. If the service requirement is waived, copies of the presentation or summary shall be placed in the record of the proceeding and the Commission or its staff shall issue a public notice which states that copies of the presentation or summary are available for inspection. The Commission or its staff may determine that service or public notice would interfere with the effective conduct of an investigation and dispense with the service and public notice requirements;

(iii) if the presentation is made in a proceeding subject to permit-but-disclose requirements, disclosure must be made in accordance with the requirements of § 1.1206(d); provided, however, that the Commission or its staff may determine that disclosure would interfere with the effective conduct of an investigation and dispense with the disclosure requirement;

(iv) if the presentation is made in a proceeding subject to the sunshine or circulation period prohibition, disclosure must be made in accordance with the requirements of § 1.1206(d) or by other adequate means of notice that the Commission deems appropriate;

Note: If the Commission or its staff dispenses with the service or notice requirement to avoid interference with an investigation, a determination will be made in the discretion of the Commission or its staff as to when and how disclosure should be made if necessary. *See Amendment of Subpart H, Part I*, 2 FCC Rcd 6053, 6054 ¶ ¶ 10-14 (1987).

(b) Ex parte presentations are permissible and need not be disclosed with respect to the following matters, unless the Commission, or the relevant Bureau of Office after consultation with the Office of General Counsel, finds by order or public notice that application of the reporting requirements of § 1.1206 would serve the public interest:

(1) a complaint proceeding in which the complaint is not served on the subject of the complaint (unless it is a formal complaint under 47 U.S.C. § 208); and

(2) notice of inquiry proceedings.

6. Section 1.1206 is amended by revising paragraphs (a)(1), (a)(2), and deleting paragraph (a)(3), redesignating paragraphs (a)(1), (a)(2), and (a)(3), as paragraphs (d)(1), (d)(2), and (d)(3), and adding new paragraphs (a), (b), and (c) to read as follows:

§ 1.1206 Permit-but-disclose proceedings.

(a) Unless a proceeding is restricted under § 1.1208 or the presentation is exempt under § 1.1204(a) or (b), ex parte presentations in any Commission proceeding by persons outside the Commission to decision-making personnel are subject to the disclosure requirements set forth in subsection (d) of this section; provided, however, that the requirements of this subsection may be waived where confidentiality is necessary to protect persons making ex parte presentations from possible reprisal.

(b) The disclosure requirements for ex parte presentations set forth in subsection (d) of this section become applicable and remain in effect until the proceeding is no longer subject to reconsideration or judicial review:

(1) in a rulemaking, upon the filing of a petition for rulemaking, the issuance of a notice of proposed rulemaking, a rulemaking order done without notice and comment (for purposes of subsequent reconsideration or review); or

(2) in any proceeding other than a rulemaking, whenever a person becomes a party to the proceeding, as defined by § 1.1202(d).

Note: The disclosure requirements of subsection (d) of this section are potentially applicable after a filing initiating an adjudicatory proceeding (such as the filing of an application, waiver request, request for declaratory relief, or other filing seeking affirmative relief). However, the disclosure requirements only apply to ex parte presentations. Accordingly, presentations by a sole party to a proceeding would not be subject to the disclosure requirements of subsection (d) of this section because they would not be deemed ex parte presentations under § 1.1202(b).

Examples: After the filing of an uncontested application, the applicant would be the sole party to the proceeding. The applicant would have no other party to serve with any presentations to the Commission, and such presentations would therefore not be "ex parte presentations" as defined by § 1.1202(b) and would not have to be reported. On the other hand, in the example given, because the applicant is a party, a third person who wished to make a presentation to the Commission concerning the application would either have to serve the applicant or disclose any unserved presentations. Further, once the proceeding involved additional "parties" as defined by § 1.1202(d) (*e.g.*, an opponent of the applicant who served the opposition on the applicant), the applicant and other parties would have to either serve the other or disclose any unserved presentations.

(c) Unless otherwise exempted under § 1.1204, presentations made by a member of Congress or his or her staff or by an agency or branch of the Federal Government or its staff, that are of substantial significance and clearly intended to affect the ultimate decision, shall be treated as ex parte presentations and placed (if oral, a written summary of the presentation shall be prepared and placed) in the record of the proceeding by Commission staff or in accordance with subsection (d).

(d) The following disclosure requirements apply:

(1) *Written presentations.* A person who makes a written ex parte presentation subject to this section shall, within three days of the presentation, submit two copies of the presentation to the Commission's secretary under separate cover for inclusion in the public record. The presentation (and cover letter) shall clearly identify the proceeding to which it relates, including the docket number, if any, shall indicate that two copies have been submitted to the Secretary, and must be labeled as an ex parte presentation. If the presentation relates to more than one proceeding, two copies shall be filed for each proceeding.

(2) *Oral presentations.* A person who makes an oral ex parte presentation subject to this section shall, within three days of the presentation, submit to the Commission's Secretary, with copies to the Commissioners or Commission employees involved, an original and one copy of a memorandum containing a concise summary of the entire content of the presentation, including the issues discussed, the positions taken, and all arguments and data presented. The memorandum (and cover letter) shall clearly identify the proceeding to which it relates, including the docket number, if any, shall indicate that an original and one copy have been submitted to the Secretary, and must be labeled as an ex parte presentation. If the presentation relates to more than one proceeding, two copies of the memorandum (or the original and one copy) shall be filed for each proceeding. If a Commissioner or Commission employee involved in the presentation believes that the memorandum does not adequately describe the presentation, he or she may request that the person file a supplemental memorandum or may file a memorandum for the record him- or herself.

(3) *Notice of ex parte presentations.* * * * *

Note 1: * * * *

Note 2: * * * *

8. Section 1.1208 is amended by revising paragraphs (a) and (b) and deleting paragraph (c) to read as follows:

§ 1.1208 Restricted proceedings.

(a) Ex parte presentations (except those which are exempt under § 1.1204) to or from decision-making personnel are prohibited:

(1) in any Commission proceeding in which there has been release of an order designating an evidentiary hearing before an administrative law judge or the full Commission. Persons having knowledge that, in a particular proceeding, a hearing designation order, show cause order, or other order designating a hearing is in preparation are prohibited from making or receiving ex parte presentations from the time they acquire such knowledge;

(2) in any proceeding in which there has issued a public notice indicating the filing of mutually exclusive applications which are not subject to selection by auction or lottery. Persons initiating a presentation who have knowledge that mutually exclusive applications have been filed prior to the release of a public notice are prohibited from making or receiving ex parte presentations from the time they acquire such knowledge; and

(3) in any Commission proceeding in which the Commission, or relevant Bureau of Office after consultation with the Office of General Counsel, determines that such ex parte presentations should be prohibited.

(b) Ex parte presentations are prohibited until the proceeding is no longer subject to reconsideration or judicial review.

§ 1.1210 Prohibition on solicitation of presentations. * * * *

9. Section 1.1212 is amended by revising paragraphs (a) through (h) to read as follows:

§ 1.1212 Procedures for handling of prohibited ex parte presentations.

(a) Commission personnel who believe that an oral presentation which is being made to them or is about to be made to them is prohibited shall promptly advise the person initiating the presentation that it is prohibited and shall terminate the discussion.

(b) Commission personnel who receive oral ex parte presentations which they believe are prohibited shall forward to the Office of General Counsel a statement containing the following information:

(1) The name of the proceeding.

(2) The name and address of the person making the presentation and that person's relationship (if any) to the parties to the proceeding.

(3) The date and time of the presentation, its duration, and the circumstances under which it was made.

(4) A brief summary of the substance of the presentation.

(5) Whether the person making the presentation persisted in doing so after being advised that the presentation was prohibited.

(6) The date and time that the statement was prepared.

(c) Commission personnel who receive written ex parte presentations which they believe are prohibited shall forward them to the Office of General Counsel. If the circumstances in which the presentation was made are not apparent from the presentation itself, a statement describing those circumstances shall be submitted to the Office of General Counsel with the presentation.

(d) Prohibited written ex parte presentations and all documentation relating to prohibited written and oral ex parte presentations shall be placed in a public file which shall be associated with but not made part of the record of the proceeding to which the presentations pertain. Such materials may be considered in determining the merits of a restricted proceeding only if they are made part of the record.

(e) If the General Counsel determines that an ex parte presentation is prohibited by this subpart, he or she shall notify the parties to the proceeding that a prohibited ex parte presentation has occurred and, if the public interest so requires, shall serve on the parties copies of the presentation (if written) and any statements describing the circumstances of the presentation. Service by the General Counsel shall not be deemed to cure any violation of the rules against prohibited ex parte presentations.

(f) If the General counsel determines that service on the parties would be unduly burdensome because the parties to the proceeding are numerous, he or she may issue a public notice in lieu of service. The public notice shall state that a prohibited presentation has been made and may also state that the presentation and related materials are available for public inspection.

(g) The General Counsel shall forward a copy of any statement describing the circumstances in which the prohibited ex parte presentation was made to the person who made the presentation. Within ten days thereafter, the person who made the presentation may file with the Office of General Counsel a sworn declaration regarding the presentation and the circumstances in which it was made. The General Counsel may serve copies of the sworn declaration on the parties to the proceeding.

(h) Where a restricted proceeding precipitates a substantial amount of correspondence from the general public, the above procedures will not be followed with respect to such correspondence. The correspondence will be placed in a public file and be made available for inspection.

10. Section 1.1214 is amended to read as follows:

§ 1.1214 Disclosure of information concerning violations of this subpart.

(a) Any party to a proceeding or any Commission employee who has substantial reason to believe that any violation of this subpart has been solicited, attempted, or committed shall promptly advise the Office of General Counsel in writing of all the facts and circumstances which are known to him or her.

(b) Any person who believes that his or her own intended action may be in violation of this subpart shall consult with the Office of General Counsel before taking the action.

11. Section 1.1216 is amended by revising paragraph (a) and deleting paragraph (d) to read as follows:

§ 1.1216 Sanctions.

(a) *Parties.* Upon notice and hearing, any party to a proceeding who directly or indirectly violates or causes the violation of any provision of this subpart, or who fails to report the facts and circumstances concerning any such violation as required by this subpart, may be disqualified from further participation in that proceeding. In proceedings other than a rulemaking, a party who has violated or caused the violation of any provision of this subpart may be required to show cause why his or her claim or interest in the proceeding should not be dismissed, denied, disregarded, or otherwise adversely affected. In any proceeding, such alternative or additional sanctions as may be appropriate may also be imposed.

(b) *Commission personnel.* Commission personnel who violate provisions of this subpart shall be subject to disciplinary or other remedial action as provided in 47 C.F.R. § 19.735-107.

(c) *Other persons.* Such sanctions as may be appropriate under the circumstances shall be imposed upon other persons who violate the provisions of this subpart.

SEPARATE STATEMENT

OF

COMMISSIONER ANDREW C. BARRETT

RE: IN THE MATTER OF AMENDMENT OF 47 C.F.R. SECTION 1.1200 *ET SEQ.* CONCERNING EX PARTE PRESENTATIONS IN COMMISSION PROCEEDINGS

In this Notice of Proposed Rulemaking, the Commission seeks comments on significant modifications to the Commission's Ex Parte Rules. Simplification and certainty in these rules will make it easier for the Commission to function in a fair and efficient manner regarding matters under consideration. Notwithstanding the effort to streamline the Ex Parte Rules by generally adopting the Administrative Procedural Act provisions on Ex Parte communications (5 U.S.C. Section 557(d)), multiple classifications and exceptions exist in the proposed modifications to the rules that I am concerned that confusion regarding compliance with the rules may continue. I look forward to comments that address how the Commission can further modify its Ex Parte Rules such that the Commission can effectively and efficiently conduct its business, without the weight of complexity inherent in the Ex Parte Rules which may inhibit dialogue regarding the issues pending before the Commission.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-550

In the Matter of

Amendment of Section 73.202(b), RM-7345
Table of Allotments,
FM Broadcast Stations.
(Lafayette, Louisiana)

MEMORANDUM OPINION AND ORDER

Adopted: February 28, 1995; Released: March 22, 1995

By the Commission:

1. Before the Commission is a Petition for Reconsideration filed by C.R. Crisler, d/b/a/ Crisler Communications, of the Mass Media Bureau's *Report and Order*[1] substituting Channel 238C2 for Channel 238A, Lafayette, Louisiana, at the request of the permittee for that channel, Lafayette FM Joint Venture.[2] For the reasons set forth below, we deny Crisler's petition.

BACKGROUND

2. We have set forth Crisler's involvement in the licensing of Channel 238 to Lafayette FM in our *Memorandum Opinion and Order* in MM Docket 87-449 that we adopted today. Briefly stated, Crisler was among seventeen applicants to construct an FM station in Lafayette. His application was dismissed because he failed to pay the hearing fee and his request for waiver of the fee was denied. He failed to seek either reconsideration or Commission review of the dismissal of his application or the denial of the fee waiver in a timely manner. Accordingly, his right to pursue his application lapsed. He nonetheless thereafter filed various petitions for reconsideration seeking to forestall the grant of the construction permit.

3. In the meantime, the remaining parties to the licensing proceeding reached a settlement by which the construction permit was granted to Lafayette FM Joint Venture. After its construction permit was granted, Lafayette FM requested that its channel be upgraded, initiating the proceeding now before us. Crisler opposed the request. He made no claim that the upgrade was technically deficient in any way.[3] Rather, he claimed that action on the upgrade was precluded by the pendency of his various challenges to the Commission's licensing decisions.

4. The Bureau found that the matters Crisler raised did not prevent favorable action and that there were no technical impediments to a grant of the request. *Report and Order*, 7 FCC Rcd at 6255 n.1. Accordingly, the Bureau granted the upgrade by amending the Table of Allotments and conditionally modifying Lafayette FM's construction permit. *Report and Order*, 7 FCC Rcd at 6255 paras. 3-4.

5. Crisler has now petitioned for reconsideration of that action. Once again, he does not object on any technical grounds to the upgrade of the channel. Rather, he asserts that Lafayette FM's construction permit may not be modified because of the alleged pendency of the comparative proceeding. Lafayette FM has opposed the petition for reconsideration, and Crisler has replied.

DISCUSSION

6. Crisler reasserts his claim that the Commission should not proceed with the licensing of the FM channel so long as the issues concerning his status as an applicant are unresolved, and he incorporates by reference his earlier challenge to the qualifications of Lafayette FM Joint Venture. However, Docket No. 90-550 is a frequency allocation rulemaking, not a licensing proceeding. The objections he seeks to raise are not cognizable under the Commission's FM allocation rules or policy, and Crisler fails to explain why, as an allocations matter, the Lafayette channel should not be upgraded. As mentioned, Crisler himself once sought the upgrade. *See* note 3 *supra*.

7. Crisler had a full opportunity as a competing applicant and as a private citizen to raise the licensing issues, but he forfeited that opportunity by failing to adhere to the Commission's procedural rules, as described in our companion Order in MM Docket 87-449. Moreover, to the extent that Crisler is trying to assert his rights as a competing applicant, that effort is moot because he is no longer an applicant.

8. Accordingly, IT IS ORDERED That the Petition for Reconsideration filed by C.R. Crisler IS DENIED.

9. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

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[1] 7 FCC Rcd 6255 (1992).

[2] Pursuant to Rule 1.106(a)(1), this matter has been referred by the Bureau to the Commission.

[3] Indeed, Crisler himself had earlier sought the upgrade in the course of the comparative proceeding, but his request was premature. The Commission declined to change the channel allotment while the application proceeding was still pending because if the allotment were upgraded at that time, all the applicants would have been required to amend their applications with attendant complications and delay. *Amendment of Section 73.202(b), Table of Allotments (Lafayette, Louisiana)*, 4 FCC Rcd 5073, 5075 para. 17 (1989), *aff'd sub nom. Crisler v. FCC*, 919 F.2d 182 (D.C. Cir. 1990)(table).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-449

In re Applications of

AC BROADCASTING, INC.	File No. BPH-860506MQ
FM LAFAYETTE LIMITED PARTNERSHIP	File No. BPH-860507OF
LAFAYETTE BROADCASTING FOUNDATION	File No. BPH-860507OM
REBECCA RADIO OF LAFAYETTE	File No. BPH-860507OP

For Construction Permit for a New FM Station at Lafayette, Louisiana

MEMORANDUM OPINION AND ORDER

Adopted: February 28, 1995; Released: March 22, 1995

By the Commission:

1. Before the Commission are three pleadings filed by C.R. Crisler, d/b/a Crisler Communications, who was at one time an applicant for the construction permit at issue in this proceeding.[1] For the reasons set forth below, we deny or dismiss these pleadings.

BACKGROUND

2. Crisler was among seventeen parties that filed applications to construct an FM station in Lafayette, Louisiana. Under the rules then in effect, each applicant was required to pay a processing fee within twenty days of the designation order. 47 C.F.R. § 1.221(f)(1987).[2] Failure to submit the fee was grounds for dismissal of the application. 47 C.F.R. § 1.221(g)(1987). However, the rules permitted the applicant to seek a waiver of the fee if it could show "good cause" and that a waiver "would promote the public interest." 47 C.F.R. § 1.1115(a)(1987). An applicant that sought a waiver and did not submit the fee at the same time could not submit the fee later if the waiver was denied; it thus ran the risk that its application would be dismissed if it did not receive a waiver. 47 C.F.R. § 1.1115(c)(2)(1987).[3]

3. One month after filing his application, Crisler filed a petition for rulemaking requesting that the channel for the Lafayette station be upgraded. When the comparative proceeding was designated for hearing and the hearing fee became due, Crisler sought a waiver of the application fee, contending that if the channel allotment were upgraded as he had requested, new applications would have to be filed for the station. Under these circumstances, Crisler contended the Commission should not collect the hearing fee. He also asserted that the fee should be waived because of ongoing settlement negotiations among the applicants. Crisler did not submit the fee with his waiver application.[4]

4. Because the fee had not been submitted, the ALJ, acting in accordance with 47 C.F.R. §§ 1,221 (f) and 1.1107(b)(1987), dismissed Crisler's application. *Lafayette FM Group Limited Partnership*, FCC 87M-3216, para. 2 (December 10, 1987). Under Section 1.301(c)(2), rulings that terminate a party's participation in a hearing must be appealed within 5 days. The request for waiver of the fee was denied by the FCC's Managing Director shortly after the ALJ had dismissed Crisler's application. The Manager Director stated that neither the pendency of the rulemaking proceeding nor of settlement negotiations justified a waiver. Letter to C.R. Crisler from Edward J. Minkel, Managing Director, December 23, 1987. Under Section 1.104(b), Crisler had 30 days to seek review of this action. Crisler did not seek timely review of either the ALJ's order dismissing him from the proceeding or the Managing Director's determination not to waive the fee within these deadlines.

5. After these decisions became final, Crisler belatedly attempted to revive his application. Specifically, on February 4, 1988, Crisler wrote to the Managing Director complaining that his application had been dismissed before the Managing Director had acted on his fee waiver request. In response, the Managing Director explained that the ALJ's decision dismissing the application necessarily had been conditioned on the resolution of the fee waiver request by the Managing Director. Thus, the Managing Director stated, the timing of the judge's decision did not abridge Crisler's procedural rights. Letter to C.R. Crisler from Edward J. Minkel, Managing Director, May 17, 1988. On June 9, 1988, Crisler filed a pleading styled "Petition

[1] Specifically, Crisler has filed (1) a "Petition for Reconsideration" of a letter from the Managing Director concerning an earlier denial of a request for waiver of fees; (2) a "Motion for Stay and Petition for Reconsideration," challenging the grant of the construction permit after the remaining applicants reached a settlement; and (3) a second "Petition for Reconsideration" of the issuance of the construction permit. We find that due to the interrelationship of the pleadings it is appropriate in the unusual circumstances of this case for us to address these pleadings and to resolve these matters together. *See* 47 C.F.R. § 1.106(a)(1).

[2] The rules concerning fee payments in hearing cases were revised in 1990. *Establishment of a Fee Collection Program*, 55 Fed. Reg. 19148 (1990). The text refers to the rules in effect at the time Crisler filed his application.

[3] The rules now require all applicants to submit the fee even if they seek a waiver; the fee is refunded if the waiver is granted. 47 C.F.R. §1.1115(e) (1992).

[4] The Commission declined to change the channel allotment while the application proceeding was still pending. If the allotment were upgraded, all the applicants would have been required to amend their applications with attendant complications and delay. *Amendment of Section 73.202(b), Table of Allotments (Lafayette, Louisiana)*, 4 FCC Rcd 5073, 5075 para. 17 (1989), *aff'd sub nom. Crisler v. FCC*, 919 F.2d 182 (D.C. Cir. 1990)(table).

for Reconsideration," in which he requested reconsideration of the Managing Director's letter of May 17. This is one of the pleadings before us today.

6. In the comparative proceeding, the ALJ approved a settlement agreement among the remaining applicants and awarded the construction permit to an entity composed of those parties, Lafayette FM Joint Venture. *AC Broadcasting, Inc.*, FCC 88M-1567 (May 24, 1988). On June 9, 1988, Crisler filed a "Motion for Stay and Petition for Reconsideration," asking that the construction permit proceeding be stayed until the fee matter was resolved. The construction permit was formally issued on October 31, 1988 (Public Notice Report No. 20441), and Crisler thereafter filed a second "Petition for Reconsideration." Those petitions are also before us today.

DISCUSSION

7. We deal first with Crisler's "Petition for Reconsideration" of the denial of his fee waiver request. The ALJ dismissed Crisler's application on December 10, 1987, and the Managing Director denied Crisler's waiver request on December 23, 1987. Crisler did not respond until February 4, 1988, well past the deadlines for seeking review or reconsideration, 47 C.F.R. 1.104(b), 1.301(c)(2), and those decisions are therefore final. 47 U.S.C. § 155 (c)(7), 47 U.S.C. § 405.

8. Crisler has offered no explanation or otherwise shown good cause for his failure to seek timely review. In his letter of February 4, 1988,[5] Crisler stated that he received the Managing Director's letter of December 23 on January 10, 1988, but this bare allegation is insufficient to extend the 30-day deadline which is computed from the day after the date of release of the document at issue. *See* 47 C.F.R. § 1.4. Even if receipt of the Managing Director's letter was somehow delayed, Crisler admits that he had actual notice of the Managing Director's ruling nearly two weeks before the deadline for filing an appeal. Nevertheless, he failed to act with appropriate diligence.

9. The Managing Director's subsequent letter of May 17, 1988, which is the subject of Crisler's June 9 petition for reconsideration, did not revitalize Crisler's waiver request or license application. It was merely an attempt by the Managing Director to assuage the concern expressed in Crisler's letter of February 4 that he had been unfairly treated. The date for computing finality is measured from the Managing Director's letter of December 23rd in which he announced his decision to deny the waiver request, not his letter of May 17. The Managing Director's letter of May 17 did not extend the deadline for seeking review of his decision.

10. In that regard, we note that following the ALJ's decision to dismiss Crisler from the licensing proceeding and the Managing Director's refusal to grant Crisler's waiver request, the remaining parties reasonably relied on the apparent finality of those decisions and entered into a settlement agreement which the ALJ approved. Restoring Crisler's status as a viable applicant would be contrary to the rights of those other parties that have properly prosecuted their applications and would further impede inauguration of long-delayed new service to Lafayette. Crisler's petition of June 9, 1988 will be dismissed as untimely.

11. While we are justified in dismissing Crisler's June 9 petition as untimely, we wish to note that there is no merit in Crisler's petition. The Managing Director's explanation was correct; the timing of the ALJ's decision dismissing Crisler's application did not deny Crisler any rights to which he was entitled. Because Crisler's request for a waiver of the fee was pending when the ALJ dismissed the application, the dismissal was necessarily subject to the outcome of the waiver request and would have been undone had the waiver request been granted. *See Alianza Federal de Mercedes v. FCC*, 539 F.2d 732, 736 (D.C. Cir. 1976).

12. We note also that the Managing Director's decision of December 23 to deny the waiver request was correct: Neither the pendency of settlement negotiations nor the pendency of a petition to upgrade the channel justifies a failure to submit the hearing fee. *See Establishment of a Fee Collection Program*, 2 FCC Rcd 947, 966 & n.135 (1987) ("the fact that there are ongoing negotiations does not justify the failure to include a fee with the Notice of Appearance.") Had the Commission upgraded the FM channel during the licensing proceeding and invited new applications, Crisler would not have been assessed another hearing fee as he apparently feared. Section 1.1112(a) provides for an exemption from the fee where changes in applications are necessitated by changes in Commission's rules. *See also* 47 C.F.R. § 1.1111(a)(4).

13. Turning to Crisler's June 9 motion for stay and petition for reconsideration of the May 24 grant of the construction permit, Crisler asserts that the Commission should do nothing that will interfere with Crisler's right to comparative consideration so long as the challenge to his dismissal is still outstanding. Having today finally dismissed Crisler's challenge to the denial of his waiver request, which ratifies the dismissal of Crisler's application, the Commission has removed any lingering basis for doubt as to Crisler's entitlement to comparative consideration. The foundation for this June 9 petition has thus been dissolved and the petition will therefore be denied.

14. Crisler's second petition for reconsideration of the grant of the construction permit, which he filed on July 26, 1989, attempts to raise a number of procedural and substantive issues directed against the comparative licensing proceeding, the settlement process, and against Lafayette FM Joint Venture, but the petition is again untimely; indeed, it comes about a year too late. *See* 47 C.F.R. § 1.104 (b). Although the construction permit was granted on May 24, 1988 and issued on October 31, 1988, Crisler alleges that the construction permit "would have become final on August 6, 1989, had not an appeal been filed in a related allocation matter."[6] However, there is no self-evident basis for either the accuracy or the relevance of that assertion, and Crisler offers none. Crisler's prior appeal of our allocation decision has no bearing on the effective date of our decision to award the construction permit. This petition, too, will be dismissed as untimely.

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[5] The letter was received by the Office of the Managing Director on February 9, 1988.

[6] As mentioned in note 4 above, Crisler unsuccessfully appealed the Commission's decision not to upgrade the Lafayette frequency while the comparative hearing was underway.

15. We note in conclusion that Crisler had a full opportunity to raise the licensing issues referenced in this petition, but he forfeited that opportunity by failing to adhere to the Commission's procedural rules, as described herein. Moreover, to the extent that Crisler is still trying to assert his rights as a competing applicant, that effort is moot because he is no longer an applicant.

16. Accordingly, IT IS ORDERED That the petitions for reconsideration filed by C.R. Crisler on June 9, 1988 and June 26, 1989 ARE DISMISSED.

17. IT IS FURTHER ORDERED That the Motion for Stay and Petition for Reconsideration filed by C.R. Crisler on June 9, 1988, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Application of OPTEL, INC. CSR-4450-T

For Waiver of Section 76.502 of the Commission's Rules

MEMORANDUM OPINION AND ORDER

Adopted: March 17, 1995; Released: March 23, 1995

By the Cable Services Bureau:

1. On January 3, 1995, OpTel, Inc. ("OpTel"), filed a request for waiver of the Commission's anti-trafficking rule, 47 C.F.R. § 76.502(a), to complete the transfer of control of a cable system (the "System")[1] in Houston, Texas from Nationwide Communications Inc., to VPC Corporation, through an interim transfer to OpTel. A supplement was filed on January 13, 1995. The waiver request is unopposed.

2. OpTel represents that on January 11, 1995, through a wholly-owned subsidiary, OpTel acquired the System and several other cable and SMATV systems from Nationwide Communications Inc.[2] OpTel states that this was the first stage of a two-stage transaction, the second stage of which involves the transfer of control of OpTel from its shareholders to VPC Corporation.[3] According to OpTel, the two-stage transaction was necessitated by exigencies created by the timing of the acquisition, the requirements of certain financing arrangements, and the necessity for obtaining regulatory consents to the ultimate transaction.[4] OpTel represents that in order to close its acquisition of properties from Nationwide Communications Inc., OpTel relied upon financing provided by VPC Corporation pursuant to a promissory note that is convertible to a controlling equity interest in OpTel after receipt of all requisite regulatory approvals.[5] OpTel now seeks a waiver of the three-year holding requirement of the anti-trafficking rule because the transfer of the System from OpTel to VPC Corporation is occurring less than three years from OpTel's acquisition of the System from Nationwide.

3. Section 76.502 of the Commission's Rules implements Section 617 of the Communications Act, as amended, which, with certain exceptions, restricts the ability of a cable operator to sell or otherwise transfer ownership in a cable system within a 36 month period following either the acquisition or initial construction of the system.[6] Both the statutory provision and the rule provide, however, that in the case of a sale of multiple systems, subsequent transfers of one or more such systems to one or more third parties will be considered part of the initial transaction for purposes of the anti-trafficking provision.[7] In addition, the Commission has broad discretion to grant waivers of the holding requirement.[8]

4. The three-year holding requirement rule, and its underlying statutory provision, are aimed at restricting profiteering transactions and other transfers that are likely to adversely affect cable rates or service in the local franchise area, and are not intended to inhibit investment in the cable industry or delay or disrupt legitimate transactions.[9] Recently, the Commission stated that unless a transaction raises serious concerns on its face or any objections filed provide other public interest bases for concern, requests for waiver of the three-year holding requirement will generally be looked on favorably.[10]

5. OpTel asserts that while this transaction does not fall within the letter of the subsequent transfer exception in the statute and the rule, the transaction does fall within the spirit of that exception.[11] In addition, OpTel states that neither the ultimate transfer of control to VPC Corporation nor the interim transfer to OpTel involve profiteering or trafficking.[12] Rather, OpTel asserts that the overall transaction will enable it to maximize operating efficiencies, increase subscriber services and ultimately provide robust competition in the multichannel video marketplace.[13] Finally, OpTel asserts that the System is an overbuild system which operates pursuant to one of three non-exclusive franchises issued by the city of Houston and that the transaction is not expected to adversely affect cable rates or services in the franchise area.[14]

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[1] The cable system involved in the transaction serves noncommonly owned multiple dwelling units interconnected by fiber optic cable run through underground conduits. The System operates pursuant to a non-exclusive franchise granted by the city of Houston. OpTel Petition for Special Relief at 1 n.1, 2.

[2] OpTel Petition for Special Relief at 3; Supplement at 2.

[3] OpTel Petition for Special Relief at 1, 3-4.

[4] OpTel states that in addition to FCC consents to transfer certain 18 GHz authorizations and a CARS license, consent to consummate the ultimate transaction is required from the FTC. OpTel Petition for Special Relief at 7.

[5] Optel Petition for Special Relief at 3.

[6] 47 C.F.R. § 76.502; Section 617 of the Communications Act of 1934, as amended, 47 U.S.C. § 537.

[7] 47 U.S.C. § 537(b); 47 C.F.R. § 76.502(e)(1994).

[8] 47 U.S.C. § 537(d); *see also Implementation of Sections 11 and 13 of the Cable Television Consumer Protection and Competition Act of 1992, (Horizontal and Vertical Ownership Limits, Cross-Ownership Limitations and Anti-Trafficking Provisions), First Report and Order*, ¶ 78, 8 FCC Rcd 6828, 6839 (1993), *recon. granted in part and denied in part, Memorandum Opinion and Order on Reconsideration of the First Report and Order*, 10 FCC Rcd _____, FCC 95-21, released January 30, 1995 (MM Docket No. 92-264); 47 C.F.R. § 76.502(g).

[9] *See Implementation of Sections 11 and 13 of the Cable Television Consumer Protection and Competition Act of 1992, (Horizontal and Vertical Ownership Limits, Cross-Ownership Limitations and Anti-Trafficking Provisions), First Report and Order*, ¶ ¶ 11, 21 & 36, 8 FCC Rcd at 6830-31, 6833; 47 U.S.C. § 537.

[10] *Implementation of Sections 11 and 13 of the Cable Television Consumer Protection and Competition Act of 1992, (Horizontal and Vertical Ownership Limits, Cross-Ownership Limitations and Anti-Trafficking Provisions), Memorandum Opinion and Order on Reconsideration of the First Report and Order*, ¶ 79, 10 FCC Rcd _____, FCC 95-21, released January 30, 1995 (MM Docket No. 92-264).

[11] OpTel Petition for Special Relief at 6 n.7.

[12] OpTel Petition for Special Relief at 5.

[13] OpTel Petition for Special Relief at 7.

[14] OpTel Petition for Special Relief at 1 n.1, 5 & 7.

6. We find that OpTel has demonstrated that the proposed transaction: (a) does not adversely affect the policies underlying the anti-trafficking rule; (b) is not driven by a desire to engage in profiteering; and (c) is not expected to adversely affect cable rates or services in the affected franchise area. Consequently, based upon the totality of the evidence and for the reasons stated above, we find that grant of the requested waiver is consistent with the public interest and our obligations pursuant to Section 617(d) of the Communications Act.[15]

7. Accordingly, IT IS ORDERED that, pursuant to 47 C.F.R. § 0.321, the request for waiver of 47 C.F.R. § 76.502 IS GRANTED with respect to the proposed transfer of the Houston system from OpTel, Inc., to VPC Corporation.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

[15] The waiver is subject to any necessary consent of the local franchise authority to the proposed transfer.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

COMSAT CORPORATION File No. CSS-90-008-LA

Application for authority to participate
in the launch of the INTELSAT VII (F-5)

ORDER AND AUTHORIZATION

Adopted: March 16, 1995; Released: March 23, 1995

By the Chief, Satellite and Radiocommunication Division:

1. The Commission has under consideration the above-captioned application filed by the Communications Satellite Corporation (now COMSAT Corporation) on May 18, 1990, and supplemented on September 6, 1990 and February 17, 1995, for authority to participate in the launch, positioning and in-orbit testing of the INTELSAT VII (F-5) satellite, hereinafter referred to as the INTELSAT 705 satellite. The application appeared on the Commission's Public Notice on June 20, 1990. Comments were received by Pan American Satellite (PAS) on July 20, 1990.[1]

2. Authority to construct and operate the INTELSAT 705 satellite was granted in an order released February 5, 1990.[2] The satellite has been constructed and delivered. Current INTELSAT deployment plans approved by the INTELSAT Board of Governors at its September 1994 meeting call for the launch to take place on March 19, 1995, utilizing an Atlas IIAS launch vehicle. This satellite will replace the INTELSAT VM (F-6) at 310^0 East Longitude in the Atlantic Ocean Region (AOR).

3. The estimated costs associated with the INTELSAT 705 satellite are as follows (all amounts in real year dollars):

SS/Loral Contract	$ 80.7 million
SS/Launch Support	$ 2.9 million
Performance incentives, Capitalized	$ 2.7 million
Performance incentives, Expensed	$ 24.1 million
Support Contracts	$ 3.4 million
Launch Services Atlas IIAS	$ 96.7 million
TOTAL INTELSAT cost	$ 210.5 million
TOTAL COMSAT cost (based on current ownership share of 20.13%)	$ 42.4 million

4. The Commission has already determined that Comsat's participation in the procurement of the INTELSAT VII satellites is required to meet traffic requirements. We therefore find that the public interest will be served by a grant of Comsat's application for the launch of the INTELSAT 705 satellite as conditioned.

5. Accordingly, IT IS ORDERED that Comsat's application to participate in the launch and test program of the INTELSAT 705 satellite to be positioned at 310^0 East Longitude, IS GRANTED subject to the following terms and conditions:

(a) This authorization is limited to the described program. Any change in the authorized location due to a launch delay or other circumstances will be considered upon a proper request by Comsat for authority;

(b) Comsat shall furnish via the INTELSAT 705 satellite only those channels of communication for commercial service which have been, or may be, authorized by the Commission under Section 214 of the Communications Act of 1934, as amended;

(c) Within 30 days after completion of the testing program, Comsat shall provide the Commission with a summary report of its results and, upon request, shall make the detailed test data available;

(d) Conduct of the program authorized herein shall be without interruption of commercial satellite service now authorized at U.S. earth stations;

(e) Neither this authorization nor any right granted herein shall be assigned or otherwise transferred without approval of the Commission; and

(f) Unless extended or modified for good cause, this authorization shall terminate six months after the release date of this order.

6. This order is issued under Section 0.261 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*See* Section 1.4(b)(2)).

[1] PAS's comments are now moot. PAS initially asked that any action by the Commission be without prejudice to: 1) its appeal of the Commission's February 1990 decision authorizing Comsat's participation in the procurement of INTELSAT VII satellites; and 2) its complaint alleging that Comsat's participation in the INTELSAT VII procurement prior to receiving Commission approval constituted a violation of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151-711, the Communications Satellite Act of 1962, 47 U.S.C. §§ 701-757 and policy guidelines. Both matters have been resolved. *See* Pan American Satellite v. F.C.C., No. 90-1134 (D.C. Cir., September 19, 1990)(order dismissing PAS's appeal) and Pan American Satellite, 8 FCC Rcd 5622 (1993)(dismissing PAS's complaint).

[2] Communications Satellite Corporation, 5 FCC Rcd 753 (1990).

FEDERAL COMMUNICATIONS COMMISSION

Thomas S. Tycz
Chief, Satellite and
Radiocommunication Division
International Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: March 23, 1995

SPRINT FILES PETITION FOR WAIVER OF FLAT-RATE COMPENSATION OBLIGATION FOR PAY TELEPHONES

Comments Due: April 6, 1995
Replies Due: April 13, 1995

Sprint Communications Co. ("Sprint") has filed a petition for waiver of Section 64.1301 of the Commission's rules which requires certain interexchange carriers to compensate competitive payphone owners on a per-phone basis for originating interstate access code (10XXX or 1-800) calls. Sprint seeks a waiver of that rule so that it can compensate competitive payphone owners on a per-call basis instead. In support of its waiver request, Sprint notes that the Commission has granted a similar waiver to AT&T.

Sprint contends in its petition that it is in a position to track access code calls and pay compensation on a per-call basis. Sprint requests that the Commission allow it to pay a compensation rate of $.25 per call for all interstate calls made from payphones in equal access areas.

Parties wishing to comment on this matter may file their comments on or before **April 6, 1995**. Reply comments may be filed on or before **April 13, 1995**. All filings concerning this matter should refer to ENF 95-5. Copies of the petition and any subsequently filed documents in this matter may be obtained from ITS, Inc., 2100 M Street, NW, Suite 140, Washington, DC 20037, (202) 857-3800. The petition and other documents are also available for inspection and copying in the Public Reference Room, Plaza Level, 1250 23rd Street, NW, Washington, DC 20554.

For further information, contact Michael Carowitz at (202) 418-0960.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-210

In re Applications of

Robert D. Janecek d/b/a LION'S SHARE BROADCASTING	File No. BPH-900504MD
LOMPOC MINORITY BROADCASTERS PARTNERSHIP	File No. BPH-900518MO

For Construction Permit for a
New FM Station on Channel 285A
in Lompoc, California

MEMORANDUM OPINION AND ORDER

Adopted: March 13, 1995; Released: March 23, 1995

By the Commission:

1. Lion's Share Broadcasting (Lion's Share) and Lompoc Minority Broadcasters Partnership (LMBP) are mutually exclusive applicants for a new FM station in Lompoc, California. LMBP seeks Commission review of *Hearing Designation Order*, 6 FCC Rcd 4465 (MMB 1991), which accepted Lion's Share's application, and of a Review Board decision, *Lion's Share Broadcasting*, 8 FCC Rcd 8423 (Rev. Bd. 1993), which granted Lion's Share's application on comparative grounds. In addition, Lion's Share seeks to have this case remanded for consideration of questions relating to LMBP's basic qualifications. For the reasons set forth below, we find that Lion's Share's application was unacceptable for filing under the Commission's "hard look" processing guidelines, and that it should not have been designated for hearing. This Memorandum Opinion and Order therefore grants in part LMBP's application for review, dismisses Lion's Share's application, and remands this proceeding to the Review Board for consideration of basic qualifying issues involving LMBP.

BACKGROUND

2. Lion's Share filed its application using the provisions of 47 C.F.R. § 73.215, which permits the acceptance of applications proposing short-spaced antenna locations if they afford protection to all affected stations. In this manner, Lion's Share proposed to protect KOHD(FM), a third-adjacent channel Class A station operating in Guadalupe, California. By its *Hearing Designation Order*, the Mass Media Bureau found that, because section 73.215(e) required a minimum of 25 kilometers between the two facilities whereas Lion's Share's proposed site was only 22.5 kilometers from KOHD(FM)'s transmitter site, its application could not be processed under the provisions of section 73.215 and that it was technically unacceptable for filing. 6 FCC Rcd at 4466-4467 ¶ ¶ 10, 12. The Bureau determined, however, that "the wording of § 73.215(b)[2](ii) does not, for 'hard look' processing purposes, afford applicants full and explicit notice of the prerequisites they must meet in order to avoid summary dismissal." *Id.* at 4467 ¶ 12. Accordingly, it afforded Lion's Share, as well as another applicant, Great Scott Broadcasting, an opportunity to file curative amendments with the ALJ. By *Order* (FCC 92M-449, released April 13, 1992), the ALJ accepted Lion's Share's curative site amendment, which specified a fully spaced site. *Id.* Great Scott's application was subsequently dismissed with prejudice for reasons unrelated to section 73.215 of the rules. *Order*, FCC 92M-78 (released November 21, 1992).

3. In an Initial Decision, Administrative Law Judge Joseph P. Gonzalez concluded that Lompoc Minority Broadcasters Partnership (LMBP) was financially qualified but disqualified it on a site certification issue. *Lion's Share Broadcasting*, 8 FCC Rcd 916 (I.D. 1993). Alternatively, the ALJ concluded that, even if LMBP was basically qualified, Lion's Share would prevail on the standard comparative issue by virtue of its integration and diversification preferences. *Id.* at 918 ¶ 18.

4. LMBP filed exceptions with the Review Board arguing that Lion's Share's application should have been returned without consideration, that Lion's Share's curative site amendment was untimely and should not have been accepted, and that the ALJ should not have disqualified it on the site certification issue. Lion's Share filed limited exceptions to the initial decision urging that LMBP should have also been disqualified on the financial issue.

5. The Review Board deemed the question of whether Lion's Share's application should have been returned without consideration pursuant to the Commission's "hard look" processing standards to be beyond its jurisdiction under *Atlantic Broadcasting Co.*, 5 FCC 2d 717, 721 (1966), inasmuch as the HDO specified reasons for not returning Lion's Share's application. 8 FCC Rcd 8423 at ¶ 3. With regard to whether the site amendment was untimely, however, the Board found that the ALJ had not abused his discretion in accepting it. *Id.* at 8423-24 ¶ 5. Turning to the initial decision, the Board agreed with the ALJ that, even if LMBP were basically qualified, Lion's Share would be the clear comparative winner. *Id.* at 8424-25 ¶ 6. Accordingly, the Board affirmed the initial decision without resolving the issues relating to LMBP's basic qualifications.

6. In its application for review, LMBP argues that Lion's Share's original application was patently defective and that it should have been returned without consideration under the Commission's "hard look" processing standards. LMBP also challenges the determination of the ALJ and of the Review Board that Lion's Share's curative site amendment was diligently filed under 47 C.F.R. § 73.3522(b)(1) of the rules. LMBP further disputes its disqualification on the site certification issue.

7. Acting under delegated authority, the Office of General Counsel issued an Order (FCC 94I-041, released May 4, 1994) requesting that the Bureau provide a fuller explanation of its rationale for designating Lion's Share's application for hearing. In doing so, the Order indicated that "it [wa]s not apparent from the Hearing Designation Order how section 73.215(b)(2)(ii) pertained to Lion's Share's application or why an ambiguity in the language of section 73.215(b)(2)(ii) would warrant permitting Lion's

Share to amend to a transmitter site that meets the minimum mileage separation requirements set forth in section 73.215(e)."

8. In response, the Bureau indicates that the reference to section 73.215(b) in ¶ 12 of the Hearing Designation Order was an oversight. The Bureau submits that it had recognized that the defect in Lion's Share's application involved section 73.215(e), whereas the ambiguity was in section 73.215(b) of the rule. It notes, however, that, having determined that one subsection of the rule failed to provide adequate notice and thus warranted allowing a curative amendment, it had concluded that, in the interest of fairness, all applicants that were deficient under any subsection of that same rule should be afforded an opportunity to amend.

9. In the Bureau's view, allowing Great Scott -- a then mutually exclusive applicant for Lompoc whose application was deficient under section 73.215(b) of the rules -- to file a curative amendment while at the same time rejecting Lion's Share's application for a failure to comply with a subsection of that same rule would draw too fine a line. In support of this approach, the Bureau cites *Radio Lompoc Limited Partnership*, 7 FCC Rcd 3798, 3800 (1992), in which the Commission observed that "the wording of Section 73.215 of the rules does not afford applicants full and explicit notice of certain technical requirements necessary to avoid dismissal under the hard look policy" without distinguishing between the different provisions of sections 73.215(b) and 73.215(e) of the rules.

10. Lion's Share endorses the Bureau's approach as being "clear and logical," and urges that this approach was ratified by the full Commission in *Radio Lompoc*. It notes that section 73.215 is a complex rule dealing with the circumstances in which applicants may specify short-spaced transmitter sites, and that its subsections are interrelated. It contends further that the acceptance of its curative site amendment did not prejudice LMBP, and that the public interest is best served by having the widest possible choice of applicants. See *Crosthwait v. FCC*, 584 F.2d 550, 555 (D.C. Cir. 1978); *Azalea Corp.*, 31 FCC 2d 561, 563 (1971). Finally, Lion's Share claims justifiable reliance on the Bureau's action, as reflected in the fact that it has devoted almost three years and tens of thousands of dollars to the prosecution of its application.

DISCUSSION

11. Based upon the pleadings before us,[1] we conclude that, due to the short-spacing with station KOHD(FM), Lion's Share's application was unacceptable for filing and should have been returned without consideration pursuant to the Commission's "hard look" processing guidelines. We therefore dismiss Lion's Share's application and remand this proceeding for consideration of the unresolved issues relating to LMBP's basic qualifications.

12. Under the Commission's "hard look" processing guidelines, an FM application found to be sufficient for tender is studied to determine its acceptability for filing, that is, its compliance with the technical requirements for FM facilities. *Processing of FM and TV Broadcast Applications*, 50 Fed. Reg. 19936, 19941 ¶ 32 (1985). To be acceptable for filing, FM applications must comply with distance separation standards. *Public Notice*, FCC 84-366 (Aug. 2, 1984).[2] Applications that do not comply with these requirements and do not contain an appropriate waiver request are returned, and returned applications may not be amended even if the acceptance of curative amendments would not result in prejudice to any competing applicant. 50 Fed. Reg. at 19941 ¶ 31-32. The adoption of stringent processing standards reflects a determination by the Commission that expediting the initiation of new service to the public is of greater importance than maximizing the choice of qualified applicants.[3] The courts have generally upheld our authority to adopt such rigid processing guidelines, provided clear guidance is given of the prerequisites that an application must meet in order to receive full consideration. See, e.g., *Malkan FM Associates v. FCC*, 935 F.2d 1313 (D.C. Cir. 1991); *Salzer v. FCC*, 778 F.2d 869 (D.C. Cir. 1985), citing *Radio Athens, Inc. v. FCC*, 401 F.2d 398, 401 (D.C. Cir. 1968).

13. Turning to the facts of this case, the applications filed by Lion's Share and Great Scott were substantially complete at tender in that both sought processing under section 73.215 and both included exhibits intended to demonstrate compliance with that rule with respect to stations with which their original proposals were short-spaced.[4] However, both applications were unacceptable for filing because they did not comply with the Commission's minimum distance separation rules.

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[1] The Commission has before it: (a) an application for review, filed January 6, 1994, by LMBP; (b) a petition to reopen the record and for leave to amend, filed January 6, 1994, by LMBP; (c) an opposition to application for review, filed January 21, 1994, by Lion's Share; (d) an opposition to application for review, filed January 11, 1994, by the Mass Media Bureau; (e) a request for remand, filed March 10, 1994, by Lion's Share; (f) an opposition to the request for remand, filed March 21, 1994, by LMBP; and (g) a reply to opposition, filed March 30, 1994, by Lion's Share. Also pending before the Commission are the following pleadings that were filed in response to the delegated authority order, FCC 94I-041 (May 4, 1994): (a) Comments, filed May 19, 1994, by the Mass Media Bureau; (b) Comments filed on May 26, 1994, and an Erratum thereto filed on May 27, 1994, by LMBP; and (c) Response, filed May 31, 1994, by Lion's Share.

[2] See also 47 C.F.R. §.73.207(a), providing that "The Commission will not *accept* applications for new stations ... unless transmitter sites meet the minimum distance separation requirements of this section, or such applications conform to the requirements of § 73.213 or 73.215." (emphasis added.)

[3] See, e.g., *Report and Order*, *id.* at ¶ 32, in which the Commission indicated that permitting untimely curative amendments of applications deemed to be unacceptable for filing "poses too great a threat to the orderly functioning of our new processing procedures." Cf. *Imagists*, 8 FCC Rcd 2763, 2764 ¶ ¶ 10-11 & nn.4-6 (1993), and the cases cited therein, in which the Commission noted that its original concern with maximizing the choice of applicants has been tempered by its obligation to expedite service to the public. *Accord Star Signal Corp.*, 1 FCC Rcd 450, 451 ¶ 8 (1986); *Chudy Broadcasting Corp.*, 58 RR 2d 133, 134 n.7 (1985).

[4] *See Amendment of Part 73 to Permit Short-spaced FM Station Assignments by Using Directional Antennas*, 4 FCC Rcd 1681, 1686 ¶ 35 (1988) (The submission of a contour protection exhibit intended to demonstrate compliance with section 73.215 is an additional element of substantial completeness at tender.) There is no merit to LMBP's repeated claim that Lion's Share did not study or provide contour protection to station KOHD(FM). Application for review at 3; Comments at 4. Lion's Share's application specifically proposed to use a directional antenna to provide equivalent contour protection to station KOHD(FM), as contemplated by section 73.215, and its en-

14. In the case of Great Scott, the Bureau found that its engineering data failed to establish that the contours of existing station KCAQ would be protected according to the technical specifications of section 73.215(b)(2)(ii). *HDO*, 6 FCC Rcd at 4466-67 ¶ 11. Inadequate protection was proposed because Great Scott had improperly determined the contours of station KCAQ, thereby underestimating the amount of the overlap that would exist between the two facilities. Because the wording of section 73.215(b)(2)(ii) did not afford applicants "full and explicit notice of the prerequisites they must meet to avoid summary dismissal," however, the Bureau permitted Great Scott to file a curative amendment. *Id.* at 4467 ¶ 12.

15. In contrast, the defect rendering Lion's Share's application technically unacceptable for filing under section 73.215 involved no determination as to the contours of third-adjacent channel Class A station KOHD(FM). Rather, the defect in Lion's Share's application was readily discernible from the Table contained in section 73.215(e), which lists the exact minimum separation distances of antenna locations that an application filed pursuant to section 73.215 must meet in order to be accepted for filing.[5] According to that Table, the antenna locations of a class A FM station and a third adjacent FM station had to be separated by at least 25 kilometers.[6]

16. Notwithstanding this unambiguous requirement, the original transmitter site for Lion's Share's proposed class A FM station in Lompoc was only 22.5 kilometers from that of station KOHD(FM) in Guadalupe. *Id.* at 4466 ¶ 10. Because the minimum distance separation requirement was readily discernible from the Table, we conclude that the Bureau erred in permitting Lion's Share to amend to a properly spaced site. Such action was, in our view, contrary to the plain meaning of section 73.215(e) that "[t]he Commission will not *accept* applications [filed pursuant to section 73.215] that specify a short-spaced antenna location for which the following minimum separation requirements, in kilometers (miles), are not met." (emphasis added).

17. By the same token, we reject the suggestion that fairness required that Lion's Share be allowed to amend its application to comply with the unambiguous distance separation requirements set forth in section 73.215(e) simply because a mutually exclusive application found to be deficient under 73.215(b)(2)(ii) was allowed to amend. Notwithstanding the Bureau's claim, the Commission did not affirm such an approach in *Radio Lompoc*, which concerned the previously dismissed application filed in this proceeding by Radio Lompoc Limited Partnership (RLLP). RLLP's application had been returned as untenderable due to the lack of a full scale transmitter site map. RLLP challenged the return of its application, alleging disparate treatment vis-a-vis Lion's Share and Great Scott, both of which were found to be technically unacceptable but were permitted to file curative amendments.

18. In rejecting the claim of disparate treatment in *Radio Lompoc*, we noted that, in contrast to the inadequacies in the wording of section 73.215 as to the requirements for a contour overlap showing, the "hard look" processing standards regarding the tenderability of FM applications always required the submission of a full-scale site map. Faced with the contention that RLLP should have been permitted to amend its application to submit a site map under the same rationale that the Bureau articulated in the HDO for allowing Great Scott and Lion's Share to file curative amendments, we distinguished their situations from that of RLLP. In this regard, however, no argument was presented and we did not focus on the fact that the deficiencies in the applications filed by Lion's Share and Great Scott involved different subsections of section 73.215.

19. Rather, we considered the two applications together and characterized both as having "defects [that] relat[e] to deficiencies in contour overlap showings ... that ordinarily would have rendered the applications in question unacceptable for filing." *Radio Lompoc*, 7 FCC Rcd at 3800 ¶ 9. As explained above, however, the defect in Lion's Share's application had nothing to do with a contour overlap showing. Because we had no occasion to consider the critical difference between the deficiency in Lion's Share's application and the deficiency in Great Scott's application, our general observation regarding inadequacies in the wording of section 73.215 should not be construed as an affirmative ruling that any deficiency under that rule, no matter how clear the language of the particular subsection involved, may be cured by amendment. Such a construction of the rule would frustrate the objectives underlying the "hard look" processing guidelines that were in effect when Lion's Share filed its application. This would not serve the public interest.

20. Finally, we reject Lion's Share's claim of equities based on detrimental reliance. Although the Bureau's erroneous acceptance of its application may have permitted Lion's Share to devote substantial resources to the prosecution of that application, this circumstance creates no equities that warrant affirming the Bureau's action. We have consistently held that under the "hard look" processing guidelines the ultimate responsibility to review an application to determine its acceptability rests, not with the processing staff, but with the applicant. *Pueblo Radio Broadcasting Service*, 5 FCC Rcd 6278 ¶ 5 (1991) (applicant not permitted to avoid dismissal of an application, which

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gineering exhibit included a "Tabulation and Map Showing Allocation Conditions with KOHD(FM)." Lion's Share's Application, Engineering Exhibit, Figures 5A and 5B.

[5] Lion's Share suggests that the subsections of section 73.215 are so interrelated that the ambiguity in subsection (b)(2)(ii) is a basis for allowing a curative amendment involving a deficiency under any subsection of the rule. However, the Report and Order adopting section 73.215 reflects a definite purpose for retaining mandatory spacing restrictions that must be met without regard to a contour overlap showing. In this regard, the Commission noted that the record did not clearly indicate the fullest extent to which FM directional antennas could be employed. *Amendment of Part 73*, 4 FCC Rcd at 1685 ¶ 32. Accordingly, it determined that "short-spaced locations w[ould] be allowed, but only to the extent that would be feasible if the stations were to operate with the approximate minimum facilities permitted their class." *Id.* It stated that "[t]he exact distances involved are given in a table in new section 73.215." *Id.* That table is set forth in section 73.215(e) of the rule.

[6] When Lion's Share filed its application on May 4, 1990, and at the time of the *HDO*, section 73.215(e) required a minimum spacing between antenna locations of 25 kilometers (16 miles). The rule was subsequently amended, and it now requires a minimum distance between antenna locations of 29 kilometers (18 miles).

exceeded the height restrictions for antennas within 199 miles of the Mexican border, because the staff inadvertently failed to return the application).

21. Having determined that Lion's Share's should not have been designated for hearing, we remand this case to the Review Board for consideration of the site certification and financial issues previously specified against LMBP. Exceptions filed with the Review Board challenged the ALJ's findings on both issues, but neither issue was resolved by the Board because it agreed with the ALJ that Lion's Share would prevail on the comparative issue even if LMBP was fully qualified.[7]

22. With the dismissal of Lion's Share's application, LBMP is the only remaining applicant for an FM station on Channel 285A in Lompoc, California. The unresolved issues relating to its basic qualifications are therefore ripe for consideration. To the extent that LMBP urges in its application for review that the Commission should review the ALJ's determinations with respect to the site and financial issues, we believe that the public interest would be best served by remanding this case to the Review Board so that it may determine in the first instance whether LMBP is basically qualified. In order to allow the Commission to devote its time to major matters of policy and to more significant adjudicatory matters, the Commission has delegated authority to the Review Board to review exceptions to Initial Decisions.[8]

23. ACCORDINGLY, IT IS ORDERED, That the application for review, filed January 6, 1994, by Lompoc Minority Broadcasters Partnership IS GRANTED in part.[9]

24. IT IS FURTHER ORDERED, That the application filed by Lion's Share Broadcasting (File No. BPH-900504MD) IS DISMISSED.

25. IT IS FURTHER ORDERED That the petition to reopen the record and for leave to amend, filed January 6, 1994, by Lompoc Minority Broadcasters Partnership IS GRANTED; and that the attached amendment IS ACCEPTED.[10]

26. IT IS FURTHER ORDERED, That the request for remand, filed March 10, 1994, by Robert D. Janecek d/b/a Lion's Share Broadcasting IS GRANTED; and that this proceeding IS REMANDED to the Review Board for such further proceedings as may be warranted to resolve the following issues:

(1) To determine whether LMBP made a material misrepresentation, or lacked candor, when it certified in its application that it had reasonable assurance that its proposed transmitter site was available;

(2) To determine whether LMBP made a material misrepresentation, or lacked candor, when it certified in its application that it had reasonable assurance of the availability of funds that it estimated that it would need to construct and operate its proposed station;

(3) To determine in light of the evidence adduced under the foregoing issues whether LMBP is basically qualified to be a Commission licensee.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

[7] Nonetheless, the Board indicated that a remand to the ALJ might be required on the site issue. 8 FCC Rcd at 8424 ¶ 6 & n.5. It noted that with regard to whether LMBP had made a material misrepresentation or lacked candor in certifying reasonable assurance of a transmitter site, the ALJ had not made any findings as to whether the intent of the principal of LMBP that executed the certification was fraudulent. *Id.* at n.5.

[8] See *Horne Industries, Inc.*, FCC 83-205, 53 RR 2d 1647, 1648 ¶ 3 (1983); *Alexander S. Klein, Jr.*, 67 FCC 2d 894, 895 ¶ 2 (1977).

[9] Because the Review Board did not resolve the questions relating to LMBP's basic qualifications, we have not considered that portion of LMBP's application for review urging that it made no material misrepresentation when it certified reasonable assurance of a site.

[10] By its amendment, filed January 6, 1994 pursuant to 47 C.F.R. § 1.65 of the rules, LMBP submits a "Lease Option" agreement to its original transmitter site that was executed January 5, 1994 by landowners William R. Sudden and Stanley O. Hollister and by LMBP partner Richard Keating. No comments have been received concerning the amendment; good cause has been shown; and the amendment may therefore be accepted. However, the amendment is accepted for reporting purposes only, and its acceptance involves no determination as to what effect, if any, the amendment may have on the site and misrepresentation issues specified against LMBP.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

EASTERN KENTUCKY UNIVERSITY — File No. BPLIF-920819DB
Lexington, Kentucky

KENTUCKY TECHNICAL — File No. BPLIF-931230ER
Lexington, Kentucky

For Construction Permit and License
in the Instructional Television Fixed
Service on Channels C1-C4.

MEMORANDUM OPINION AND ORDER

Adopted: March 15, 1995 **Released: March 23, 1995**

By the Commission:

1. The Commission has before it for consideration the above-captioned mutually exclusive applications of Eastern Kentucky University (Eastern) and Kentucky Technical (Technical), each seeking a construction permit and license in the Instructional Television Fixed Service (ITFS) on Channels C1-C4 in the area of Lexington, Kentucky.

BASIC ELIGIBILITY

2. Before applying the mutually exclusive selection procedure to determine the number of merit points to be awarded to each applicant, we must first ascertain the basic eligibility of the applicants. Educational institutions and governmental organizations that propose to serve either their own enrolled students or students at accredited schools within their respective jurisdictions establish their eligibility by accreditation from the appropriate state department of education or a recognized regional or national accrediting organization. Other ITFS applicants that propose to serve students at accredited schools outside of their respective jurisdictions must, to be eligible, submit letters of intended use from those schools and establish local program committees in those communities. See 47 C.F.R. Section 74.932(a) (1)-(5). Both applicants are qualified to be ITFS licensees. Eastern and Technical are accredited by the Southern Association of Colleges and Schools, and both are proposing to provide ITFS service to their own students.

MUTUALLY EXCLUSIVE SELECTION PROCEDURE

3. In cases of mutually exclusive applications, where applicants are competing for the same or adjacent channels in the same geographic area, each application is reviewed pursuant to our comparative process. This procedure awards a maximum of twelve merit points based on five criteria deemed to be most relevant to predicting the applicant best qualified to provide the service for which the ITFS spectrum has been allocated. *Instructional Television Fixed Service - Second Report and Order in MM Docket No. 83-523, (Second Report and Order)*, 101 FCC 2d 49, 65-72 (1985); 47 C.F.R. Section 74.913. First, four points are awarded to local applicants.[1] Second, three points are awarded to applicants which are accredited schools, educational institutions, or school boards and school districts applying within their jurisdictions. Third, two points are awarded to applicants whose requests would result in the acquisition by these applicants of four or fewer ITFS channels within the particular area. Fourth, either one or two points may be awarded to applicants for specified levels of proposed ITFS programming.[2] Fifth, one point is awarded to applicants which are existing E or F channel licensees seeking to relocate on another ITFS channel group, where such applicants show an established need for an expanded service that cannot be accommodated on their grandfathered E or F facilities. The tentative selectee is the applicant with the highest score.

4. Under this comparative selection process, the applicants are awarded points based on the following criteria:

Localism. Eastern and Technical are entitled to four pointsbecause each is an educational institution that proposes to serve the formal educational needs of its own students.

Accreditation. Both applicants are entitled to three points because each is accredited by the Southern Association of Colleges and Schools.

Four-Channel Limitation. Neither applicant is the licensee of, or has filed applications for, additional ITFS channels in its proposed service area. Therefore, each applicant is entitled to two points for remaining within the four-channel limitation.

Instructional Programming. ITFS applicants detail their formal educational and other ITFS programming proposals in both a program schedule and a programming "grid." Eastern's illustrative schedule and programming grid propose an average of 41 hours of formal educational programming per channel per week. Thus, Eastern is entitled to two programming merit points. In contrast, Technical's illustrative schedule and programming grid propose an average of 41 hours of ITFS programming. However, only

[1] A "local" applicant is an institution or organization that is physically located in the community or metropolitan area where service is proposed. *Second Report and Order*, 101 FCC 2d at 59; 47 C.F.R. Section 74.932, Note 1.

[2] One point is awarded for a proposed weekly schedule of at least 21 average hours per channel of formal educational programming or of at least 41 average hours per channel of other ITFS programming. Two points are awarded for a proposed weekly schedule of at least 41 average hours per channel of formal educational programming or at least 61 hours per channel of ITFS programming where at least 21 of those hours are formal educational programming. 47 C.F.R. Section 74.913(b)(4).

25 of the proposed 41 hours of ITFS programming will be formal instructional programming. Consequently, Technical is only entitled to one programming merit point.

E- and F- Channel Group Relocation. Neither applicant is the current licensee of an E or F channel seeking to relocate to other channels. Therefore, neither is entitled to the one point for such applicants.

Total. Eastern is entitled to four points for being local, three points for being accredited, two points for observing the four-channel limitation, and two points for proposing at least 41 hours of formal educational programming per channel per week, for a total of eleven points. Technical is entitled to four points for being local, three points for being accredited, two points for observing the four-channel limitation, and one point for proposing at least 21 hours of formal educational programming per channel per week, for a total of ten points. Thus, the tentative selectee is Eastern.

OTHER MATTERS

5. Eastern proposes to lease its excess capacity for non-ITFS use, as permitted by 47 C.F.R. Section 74.931. The applicant has submitted a copy of its lease with United States Wireless Cable, Inc., which conforms in all respects with our requirements.

6. No petitions to deny or informal objections have been filed against Eastern's application, and we find Eastern fully qualified to be an ITFS licensee. We also conclude that grant of Eastern's application would serve the public interest, convenience and necessity.

7. Accordingly, IT IS ORDERED, That the application of Kentucky Technical (BPLIF-931230ER) IS DENIED, and the application of Eastern Kentucky University (BPLIF-920819DB) IS GRANTED.

8. IT IS FURTHER ORDERED, That the staff of the Mass Media Bureau shall send copies of this decision to the applicants by certified mail, return receipt requested.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

JAMES A. KAY, Jr. FOIA Control No. 94-248

On Request for Inspection
of Records

MEMORANDUM OPINION AND ORDER

Adopted: February 17, 1995; Released: March 24, 1995

By the Commission:

1. Before the Commission is an Application for Review filed by James A. Kay, Jr., seeking review of an August 26, 1994, ruling by the Chief, Field Operations Bureau ("FOB"), which denied Kay's Freedom of Information Act ("FOIA") request. *See* 5 U.S.C. Section 552. In his request, Kay sought disclosure of (1) any complaints regarding the operation of SMRS station WNWK982, and (2) the case file regarding the inspection of station WNWK982.

2. FOB informed Kay that the release of any records relevant to his request could reasonably be expected to interfere with an enforcement proceeding. Accordingly, FOB denied access to the records pursuant to Exemption 7(A) of the FOIA. *See* 5 U.S.C. Section 552(b)(7)(A).[1] *See also* 47 C.F.R. 0.457(g)(1) (records not normally available to the public).

3. On appeal, Kay maintains for the first time that his representative read the inspection report created by an FOB engineer during an examination of WNWK982. He urges the Commission to release this report because it "contains only written details of the inspection and no deliberative materials."[2] Kay does not appear to contest FOB's decision to withhold the case file.

4. Kay's request to release the inspection report in its entirety is denied. To do otherwise would reveal the direction of the Commission's ongoing investigation, which could reasonably be expected to interfere with that investigation.[3] *See Mapother v. Dept. of Justice*, 3 F.3d 1533, 1542-43 (D.C. Cir. 1993); *Lewis v. IRS*, 823 F.2d 375, 378-79 (9th Cir. 1987). However, we are mindful of our obligation to disclose reasonably segregable non-exempt information contained in protected documents. *See Thomas B. Hamrick*, 2 FCC Rcd 6680 ¶ 4 (1987). We conclude that disclosure of the portion of the inspection report shown to Kay's representative is not within any FOIA exemption, and therefore that portion will be disclosed. After reviewing the case file, we also believe that the Bureau erroneously withheld FOB's Mobile Operations Log and accompanying illustrations, and various publicly available computer print-outs. We therefore order these documents released to Kay.

5. In light of the above reasons, IT IS ORDERED that the Application for Review filed by James A. Kay, Jr., IS GRANTED to the limited extent indicated herein, and in all other respects is DENIED. Judicial review of this action may be sought pursuant to 5 U.S.C. Section 552(a)(4)(B).

The Officials responsible for this action are the following Commissioners: Reed E. Hundt, Chairman, James H. Quello, Andrew C. Barrett, Rachelle B. Chong and Susan Ness.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

[1] Exemption 7(A) of the FOIA provides that documents are exempt from disclosure if they are "records or information compiled for law enforcement purposes, but only to the extent that the information . . . could reasonably be expected to interfere with enforcement proceedings." 5 U.S.C. 552(7)(A).

[2] Kay also submits certain FCC records which he believes were withheld by FOB pursuant to the instant FOIA request. Kay indicates in his Application for Review that he obtained these documents pursuant to earlier FOIA requests. He asks the Commission to confirm that these documents were withheld or, alternatively, to provide him with a Vaughn list describing the withheld documents. None of the documents submitted by Kay, which had been provided in response to earlier FOIA requests, were withheld by the FOB in conjunction with this request. We note that a Vaughn index is not required with regard to Exemption 7(A). *See NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 236 (1978); *In re Dept. of Justice*, 999 F.2d 1302, 1309 (8th Cir. 1993), *cert. denied*, 114 S. Ct. 1186 (1994).

[3] We note that on November 8, 1994, the United States District Court for the District of Columbia upheld the Commission's refusal to release certain documents to Kay under a different FOIA suit on the basis that their release would interfere with the agency's ongoing investigation of Kay. *See James A. Kay, Jr. v. FCC*, Civil No. 94-1105 (CRR), 1994 WESTLAW 630866 (Nov. 8, 1994).

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

Frank Elwood and Wanda Jean Elwood, Assignors — File Nos. BAL-921021EA, BALH-921021EB

J. Thomas Development of New Mexico, Inc., Assignee

For Assignment of the Licenses of Stations KCQL(AM), Aztec, New Mexico KKFG-FM, Bloomfield, New Mexico

Robert D. Coker, Receiver, Assignor — File Nos.BAL-921021EC, BALH-921021ED

J. Thomas Development of New Mexico, Inc., Assignee

For Assignment of Licenses of Stations KRZE(AM), KRAZ-FM, Farmington, New Mexico

MEMORANDUM OPINION AND ORDER

Adopted: March 8, 1995; Released: March 24, 1995

By the Commission:

1. The Commission has before it an application for review filed June 24, 1993, on behalf of Basin Broadcasting, Kennland Broadcasting, and Dewey Matthew Runnels licensees of radio broadcast stations in Farmington and Aztec, New Mexico ("Petitioners"). Pursuant to 47 C.F.R. §1.115, Petitioners request review of the May 18, 1993 action by the Chief, Audio Services Division, Mass Media Bureau, denying Petitioner's petition to deny and granting the above-captioned application for assignment of licenses (BAL-921021EA; BALH-921021EB) of KCQL(AM), Aztec New Mexico, and KKFG-FM, Bloomfield, New Mexico, from Frank Elwood and Wanda Jean Elwood to J. Thomas Development of New Mexico, Inc. ("Thomas Development"), and the above-captioned application for assignment of licenses (BAL-921021EC; BALH-921021ED) of KRZE(AM)/KRAZ-FM, Farmington, New Mexico from Robert D. Coker, Receiver to Thomas Development. *See Letter from Larry D. Eads, Chief, Audio Services Division to David D. Oxenford, Jr., Esquire*, (May 18, 1993). On July 12, 1993, Thomas Development filed an opposition to the application for review. On July 21, 1993, Petitioners filed a reply. Petitioners argue that Thomas Development's principal, Jeff Thomas ("Thomas"), made an unlawful settlement payment to induce a competing applicant for a new FM station in Kirtland, New Mexico to dismiss its application, and that the grant of the above-captioned applications contravened the Commission's radio ownership rules.[1]

2. *Settlement Payment.* On February 26, 1991, Thomas filed an application for construction permit (BPH-910226MB) proposing a new FM station to serve Kirtland, New Mexico. On February 27, 1991, Roscoe Lee Hooper ("Hooper") filed a competing application for construction permit (BPH-910227MF). On October 8, 1991, Thomas and Hooper filed a joint request for approval of settlement agreement, which sought approval of a September 10, 1991 agreement pursuant to which Hooper sought dismissal of his application for construction permit in exchange for payment from Thomas of the lesser of $7,500 or expenses incurred by Hooper in the preparation, filing, and prosecution of his application.[2] The joint request acknowledged that Hooper's application was subject to dismissal for failure to pay the required hearing fee and indicated that, consistent with the settlement agreement for which the parties sought approval, Hooper would not appeal a Commission action dismissing his application for failure to pay the fee. Thereafter, by letter dated November 4, 1991, the Commission dismissed Hooper's application for failure to pay the required hearing fee, and, as agreed upon, Hooper did not request reconsideration of that action. *See Letter from Larry D. Eads, Chief, Audio Services Division to Jeff and Joella Thomas* (November 4, 1991). Subsequently, by letter dated March 17, 1992, the Commission granted Thomas' application and dismissed the joint request for approval of settlement agreement as moot. *See Letter from Dennis L. Williams, Chief, FM Branch to Jeff and Joella Thomas* (March 17, 1992). Thomas states that after consulting with his attorney and Commission staff he paid Hooper $7,500 pursuant to the terms of the settlement agreement.

[1] On April 14, 1994, Petitioners filed a motion to set aside grant of the above-captioned applications, contending that Thomas Development failed to satisfy a condition of the grant requiring Thomas, prior to consummation of its acquisition of the stations, to surrender his construction permit (BPH-910226MB) for KMYI-FM, Kirtland, New Mexico, or assign the construction permit to a third party approved by the Commission. Thomas was required to divest the KMYI-FM construction permit in order to enable Thomas Development to acquire two AM and two FM stations in the same market. *See* 47 C.F.R. §73.3555(a)(1)(ii). In that connection, Petitioners allege that Thomas Development consummated its acquisition of KRZE(AM) and KRAZ-FM on April 4, 1994, prior to Thomas surrendering or assigning the KMYI-FM construction permit. In a reply filed April 28, 1994, Thomas notes that he surrendered the KMYI-FM construction permit to the Commission by letter dated April 4, 1994, and that by letter dated April 11, 1994 the Commission cancelled the permit and deleted the KMYI-FM call sign. Because the KMYI-FM construction permit was surrendered for cancellation contemporaneously with consummation of the KRZE(AM) and KRAZ-FM assignment applications, we find Petitioners contentions in that regard to be without merit and, accordingly, will deny their motion. *See Letter from Dennis L. Williams, Chief, FM Branch to Jeff and Joella Thomas*, (April 11, 1994).

[2] The joint request included an itemization of Hooper's out-of-pocket expenses, which totaled $5,733.26.

3. In a supplement to their petition to deny the above-captioned applications, Petitioners contended that Thomas' payment to Hooper pursuant to the settlement agreement contravened Section 311(c)(1) of the Communications Act of 1934, as amended (the "Act"), and Section 73.3525(a) of the Commission's rules. *See* 47 U.S.C. §311(c)(1); *see also* 47 C.F.R. §73.3525(a).[3] Specifically, Petitioners asserted that notwithstanding the Commission's failure to approve the settlement agreement following dismissal of Hooper's application, Thomas paid Hooper an amount exceeding Hooper's documented out-of-pocket expenses.[4] Petitioners further asserted that the allegedly unlawful payment rendered the joint request a false written statement to the Commission and undermined Thomas Development's character qualifications to be a Commission licensee. In its action granting the above-captioned applications, the staff concluded that no substantial and material question of fact existed warranting denial or designation of the applications for hearing, based on its review of the entire record, including an affidavit from Hooper stating that other than the consideration set forth in the settlement agreement he was neither paid nor promised anything for the dismissal of his application. In the instant application for review, Petitioners argue that notwithstanding the disputed amount of the payment from Thomas to Hooper, neither Thomas nor Hooper deny that Thomas reimbursed Hooper for his expenses pursuant to the settlement agreement, an action which Petitioners assert contravenes Section 311(c)(1) of the Act in view of the staff's failure to approve the terms of the agreement following dismissal of Hooper's competing application.

4. Section 311(c)(1) of the Act makes it unlawful for competing applicants to effectuate an agreement whereby an applicant withdraws its application without approval of the Commission. *See* 47 U.S.C. §311(c)(1). Section 73.3525(a) of the Commission's rules limits settlement payments among competing applicants for broadcast station construction permits to an applicant's legitimate and prudent out-of pocket expenses. *See* 47 C.F.R. §73.3525(a)(1); *see also In re Amendment of Section 73.3525 of the Commission's Rules Regarding Settlement Agreements Among Applicants for Construction Permits*, 6 FCC Rcd 85 (1990). Thomas acknowledges that he paid Hooper $7,500 pursuant to the terms of their September 1991 settlement agreement following advice from communications counsel and Commission staff that the Commission's November 1991 action dismissing the joint request for approval of settlement agreement as moot eliminated the requirement that the Commission approve such payment.

5. Pursuant to their September 1991 settlement agreement, Hooper agreed to obtain dismissal of his competing application in exchange for reimbursement from Thomas of his out-of-pocket expenses. Effectuation of the agreement therefore required prior Commission approval.[5] Under the Commission's rules, a greements providing for the removal of a conflict between pending applications by dismissal of one or more competing applications shall be submitted for Commission approval within five days after entering into the agreement. *See* 47 C.F.R. §73.3525(a). The Commission's rules require approval of such agreements whether the parties seek dismissal through an affirmative request to dismiss or procure dismissal by failure to prosecute, as in the instant case. *See* 47 C.F.R. §73.3568(b). From the circumstances surrounding dismissal of Hooper's application, however, it is clear that neither party intended to deceive or mislead the Commission respecting the settlement agreement for which they had sought approval. Consequently, we find that the improper payment does not raise a substantial and material question of fact whether Thomas Development possesses the character qualifications to become a Commission licensee.[6] Similarly, we note that while Thomas' payment of $7,500 to Hooper exceeded Hooper's documented out-of-pocket expenses by almost $1,777, the amount of the payment was consistent with that disclosed to the Commission in the settlement agreement originally submitted for Commission approval. We will therefore deny Petitioners' application for review with respect to the foregoing questions presented.[7] In order to avoid future confusion on the part of competing applicants for broadcast facilities as appears to have occurred in this case, we want to make clear that when dismissing an application for construction permit for a broadcast station, the Commis-

[3] The Commission's staff found that Petitioners filed their third supplement to petition to deny outside the pleading cycle established by Section 1.45 of the Commission's rules and failed to demonstrate why the allegations raised therein could not have been presented in a timely fashion. *See Letter from Larry D. Eads, Chief, Audio Services Division to David D. Oxenford, Esquire*, (May 18, 1993); *see also* 47 C.F.R. §1.45(a)-(c). The staff therefore reviewed the contentions as informal objections to the extent necessary to determine whether grant of the above-captioned applications would serve the public interest. *Id.; see also* 47 C.F.R. §73.3587.

[4] Petitioners contended that Thomas had paid Hooper $12,000, an amount which exceeded Hooper's documented expenses of $5,733.26.

[5] Notwithstanding the asserted advice of Commission staff and communications counsel that Thomas make payment to Hooper under the settlement agreement, applicants themselves have the burden of complying with applicable statutes and rules. *See Mary Ann Salvatoriello*, 6 FCC Rcd 4705, 4707-4708 (1991).

[6] *See In re Applications of JBD Incorporated and Linda F. McCulley (Harrogate, Tennessee)*, Summary Decision, 4 FCC Rcd 7577, 7578 (1989)(ruling by A.L.J. Richard L. Sippel)($10,000 payment to competing applicant made pursuant to settlement agreement not approved by the Commission did not preclude grant of construction permit to applicant making unlawful payment or undermine applicant's character qualifications where evidence established no intent to violate Act and applicant admitted wrongful conduct); *cf. Madison County Broadcasting*, 70 FCC 2d 226 (Rev. Bd. 1978)(record in comparative proceeding reopened and additional issues added to resolve conflicting affidavit evidence suggesting that principals of one of two competing applicants had offered to reimburse a dismissing applicant for expenses, substantially all of which were intentionally not reported to the Commission); *cf. also West Jersey Broadcasting Co.*, Memorandum Opinion and Order, 39 RR 2d 1125 (ruling by A.L.J. Thomas B. Fitzpatrick)(credible evidence that one of two competing applicants concealed payment to dismissing applicant of $25,000 in excess of amount approved by the Commission ten years earlier warranted addition of issues to determine whether surviving applicant concealed material facts from the Commission); *see generally In re Policy Regarding Character Qualifications in Broadcast Licensing*, 102 FCC 2d 1179 (1986), *recon. granted in part and denied in part*, 1 FCC Rcd 421 (1986) , *appeal dismissed sub nom. National Association for Better Broadcasting v. FCC*, No. 86-1179 (D.C. Cir. June 11, 1987), *modified*, 5 FCC Rcd 3252 (1990).

[7] Although Petitioners' petition to deny contained hearsay evidence that Thomas had paid Hooper $12,000, a contention that the staff found to be unsupported, Petitioners have not presented any evidence in the instant appeal that the payment from Thomas to Hooper exceeded $7,500.

sion must affirmatively approve or disapprove a pending request for approval of settlement agreement filed pursuant to Section 311(c)(1) of the Act if the settlement agreement has a continuing effect on the rights of the parties after the dismissal.

6. *Radio Ownership Rules.* Petitioners also allege that Thomas Development's acquisition of the subject stations constitutes excessive concentration of control in violation of the local radio ownership rules, 47 C.F.R. Sec. 73.3555. In this regard, the staff found that Thomas Development had demonstrated that there are more than 15 commercial radio stations in the relevant market defined by the area encompassed by principal community contours of KCQL(AM), KKFG-FM, KRZE(AM) and KRAZ-FM, the stations Thomas Development proposed to acquire. Additionally, the staff determined that the combined audience share of the four station combination was 11.3 percent, and thus that Thomas Development's ownership of the combination was permissible under the local ownership rules.[8] Petitioners acknowledge that there are thirteen radio stations whose principal community contours intersect the principal community contours of the stations Thomas Development seeks to acquire, and thus that there are seventeen stations counted in the market when the contour overlap standard is applied. Furthermore, the Petitioners concede that the combined audience share of the stations is less than 25 percent. However, Petitioners argue that the relevant market is comprised of fewer than 15 stations and thus that the staff failed to adequately address their argument that ownership of this combination will nevertheless result in excessive concentration of control. Specifically, Petitioners contend that there are, at most, eight stations that will actually compete with the four stations that Thomas Development proposes to co-own. Consequently, Petitioners urge the Commission to find that the common ownership of four stations in a 12 station market is impermissible.[9]

7. Petitioners assert that it is appropriate to count as stations in the market only stations whose principal community contours provide coverage to at least 92.5 percent of the population within the area encompassed by the principal community contours of the stations proposed for co-ownership. Using this method, Petitioners contend there are 12 stations in the market, including the four stations Thomas Development proposes to co-own. Moreover, Petitioners apparently argue in the alternative that it would also be appropriate to define the market as San Juan county, and that eleven stations serve this market- 10 "local" stations and a class C FM station licensed to Cortez, Colorado. Petitioners claim that their method for determining the number of stations in the market more accurately reflects the actual competition facing the proposed co-owned stations. In this regard, Petitioners assert that audience share data corroborates their assertion that it is appropriate to exclude from the market defined by the contour overlap standard stations which fail to serve at least 92.5 percent of the population within the principal community contours of the proposed co-owned stations. Petitioners argue that these stations either receive no audience share in San Juan county or only a small share of the San Juan county audience.

8. Petitioners' argument concerning the number of stations to be counted in the market is essentially an untimely request for reconsideration of the radio ownership rulemaking proceeding. When the local ownership rules were amended, the Commission rejected the use of geographic definitions, including the county in which the stations proposed for co-ownership are located, to determine the relevant radio market. Additionally, the Commission declined to determine the number of stations in a market by counting only those stations licensed to communities within the area encompassed by the principal community contours of the proposed co-owned stations. Instead, the Commission decided to use a contour overlap standard to determine the number of stations in a radio market. *See In re Revision of Radio Rules and Policies,* 7 FCC Rcd 2755 (*"Report and Order"*); *recon. granted in part and denied in part,* 7 FCC Rcd 6387 (1992) (*"Recon. Order"*). In this connection, the Commission concluded that:

> This count will be made with reference to a contour overlaps standard in all situations . . . . Specifically, we will define the radio market as that area encompassed by the principal community contours . . . of the mutually overlapping stations proposing to have common ownership. The number of stations in the market will be determined based on the principal community contours of all commercial stations whose principal community contours overlap or intersect the principal community contours of the commonly-owned and mutually overlapping stations . . . .

Recon. Order, 7 FCC Rcd at 6395. The Commission found that the contour overlap standard addresses the core concerns of diversity and competition while reflecting the actual options available to listeners as well as the market conditions facing the particular stations in question. *See Memorandum Opinion and Order,* 7 FCC Rcd at 6395. Moreover, the Commission also noted that this standard for market definition is likely to be conservative because listeners in rural areas where there are few operating station, and thus low levels of daytime interference, may be able to receive signals beyond the predicted principal community contour. *See Patteson Brothers, Inc.,* 8 FCC Rcd 7595, 7596, *citing Report and Order,* 7 FCC Rcd 2755, 2779. Although Petitioners argue that some of the stations counted in the market under the contour overlap standard receive little or no audience share in San Juan county, the audience share of a station is sensitive to many factors, including the programming offered on the station. *See Recon. Order,* 7 FCC Rcd at 6395. Consequently, the Commission has already determined that the contour overlap standard, and not market share, should be used to determine the number of stations in a given market. *Id.*

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[8] The local ownership rules provide that, in markets with 15 or more stations, a single entity may own up to two AM and two FM stations, provided that the combined audience share of those stations does not exceed 25 percent. 47 C.F.R. Sec. 73.3555(a)(1)(ii).

[9] In this regard, we note that in radio markets with 14 or fewer commercial radio stations, a party is limited to the ownership of three commercial radio stations, no more than two of which are in the same service, provided that the combination represents less than 50 percent of the stations in the market. 47 C.F.R. Sec. 73.3555(a)(1)(i).

9. Thus, the Commission has already considered and rejected Petitioners alternative arguments that the number of stations in market should be determined by counting the stations serving the area within the principal community contours of the proposed co-owned stations or the county in which the proposed co-owned stations are located. *See Patteson Brothers*, 8 FCC Rcd at 7596. The contour overlap standard is embodied in 47 C.F.R. Sec. 73.3555(a)(3)(ii). Under these circumstances, the staff's application of the contour overlap standard, and thus its determination, pursuant to Section 73.3555(a)(3)(ii), that there are more than 15 stations in the market, was not, as Petitioners allege, arbitrary and capricious. *See Pacific Gas & Electric Co. v. FPC*, 506 F.2d 33, 38 (D.C. Cir. 1974)(Agency entitled to apply properly adopted rule without entertaining challenge to policy underlying rule). Petitioners do not challenge the staff's finding that the combined audience share of the stations Thomas Development proposes to co-own is less than 25 percent, and have not otherwise demonstrated an anomaly in the audience share data used to calculate the stations' combined audience share. *See Eads Broadcasting Corporation*, 9 FCC Rcd 2859 (1994). We therefore affirm the staff's finding that grant of the assignment of the stations to Thomas Development is permissible under the multiple ownership rules.

10. Accordingly, for the foregoing reasons, IT IS ORDERED, that the motion to set aside grant of the above-captioned applications IS DENIED, and that, pursuant to 47 C.F.R. §1.115, the application for review filed by Basin Broadcasting, Kennland Broadcasting, and Dewey Matthew Runnels IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In re:

Complaint of Lightning Broadcasting Company against Triax Communications Corporation — CSR-4265-M

Petition for Reconsideration

MEMORANDUM OPINION AND ORDER

Adopted: March 17, 1995; Released: March 24, 1995

By the Cable Services Bureau:

1. On February 9, 1995, a supplemental response was filed on behalf of Triax Communications Corporation, operator of cable systems serving Bethany, Findlay, Herrick, Oconee, Sullivan, and Tower Hill, Illinois. Triax requests that the Commission reconsider its January 25, 1995 order requiring Triax to commence carriage of low power television station W41BL (Channel 41), Effingham, Illinois (the "Station"), within 45 days unless Triax submitted within 15 days additional engineering data in support of its assertion of poor signal quality. We shall treat this pleading as a petition for reconsideration. No oppositions to this petition have been received.

2. In support of its request, Triax submits engineering data for the six named systems consisting of five signal level readings over the course of a two-hour period. In addition, Triax maintains that its engineers properly oriented the test antenna at each headend in the direction of the Station's transmitter tower and "peaked" the antenna until the best signal level reading was received. These tests were conducted by Triax's Chief Technician, Rockie Marsh, on February 1, 2, 6, and 7, 1995. Each set of data purport to demonstrate, consistent with Commission requirements, that W41BL's signal strength at each headend is substantially below the level of -45 dBm required for UHF stations.

3. Staff review of the undisputed engineering data submitted by Triax confirms its contention that W41BL's signal quality at the system's designated headends is not sufficient to entitle the Station to mandatory carriage on Triax's cable systems serving Bethany, Findlay, Herrick, Oconee, Sullivan, and Tower Hill, Illinois. Accordingly, the supplemental response, filed February 9, 1995, on behalf of Triax Communications Corporation IS GRANTED, and our Order adopted January 25, 1995,[1] IS RESCINDED, pursuant to authority delegated in §§0.321 and 1.106 of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson
Deputy Chief, Cable Services Bureau

[1] *Lightning Broadcasting Company against Triax Communications Corporation*, DA 95-62 (released January 25, 1995).

Before the
Federal Communications Commission
Washington, D.C. 20554

In Re

COMMUNITY CSR-3865-A
CABLEVISION
COMPANY d/b/a
DIMENSION CABLE SERVICES
Los Angeles, California

Petition for Modification of
Los Angeles ADI

MEMORANDUM OPINION AND ORDER

Adopted: March 20, 1995; Released: March 24, 1995

By the Cable Services Bureau:

INTRODUCTION

1. Community Cablevision Company ("CCC"), d/b/a Dimension Cable Services ("Dimension"), operator of a cable television system serving portions of Los Angeles, California, has filed the captioned petition for special relief. CCC requests that its cable system in the Los Angeles ADI be exempted from the Commission's rules governing the number of eligible broadcast stations that must be carried on the system, (i.e., 47 C.F.R. §§ 76.56(a)(1)(iii), 76.56(b)(2)), or, that CCC be granted a limited waiver of the rules until CCC completes its system rebuild, and that it should not be required to carry any more local commercial or noncommercial stations than the system is currently carrying.[1] Alternatively, CCC requests that the communities served by Dimension be excluded, for purposes of the must-carry rules, from the television markets of those commercial stations that Dimension would otherwise potentially be required to carry, and that the noncommercial stations Dimension would otherwise potentially be required to carry be deemed nonlocal as to those communities.[2] On June 23, 1993, Trinity Christian Center of Santa Ana, Inc., d/b/a Trinity Broadcasting Network ("Trinity"), licensee of KTBN-TV, Santa Ana, California, filed an opposition to CCC's petition. An opposition was also filed, on July 22, 1993, by KMEX License Partnership, G.P. ("KMEX"), licensee of KMEX-TV, Los Angeles, California. On September 9, 1993, Rancho Palos Verdes Broadcasters, Inc. ("RPV"), permittee of KRPA-TV, Rancho Palos Verdes, California, also filed an opposition. On September 17, 1993, CCC filed a response to RPV's opposition. On January 5, 1994, KSLS, Inc. ("KSLS"), licensee of station KSCI-TV, San Bernardino, California, filed an opposition.[3]

BACKGROUND

2. Pursuant to Section 4 of the Cable Television Consumer Protection and Competition Act of 1992 ["1992 Cable Act"][4] and implementing rules adopted by the Commission in its Report and Order in MM Docket 92-259,[5] a commercial television broadcast station is entitled to assert mandatory carriage rights on cable systems located within the station's market. A station's market for this purpose is its "area of dominant influence," or ADI, as defined by the Arbitron audience research organization.[6] An ADI is a geographic market designation that defines each television market exclusive of others, based on measured viewing patterns. Essentially, each county in the United States is allocated to a market based on which home-market stations receive a preponderance of total viewing hours in the county. For purposes of this calculation, both over-the-air and cable television viewing are included.[7]

3. This section of the 1992 Cable Act also provides that the Commission may:

> with respect to a particular television broadcast station, include additional communities within its television market or exclude communities from such station's television market to better effectuate the purposes of this section.

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[1] CCC states that its system rebuild, which is currently in progress, should be completed by mid-1995; that, by then, CCC would have the capacity for a minimum of 60 channels, with network architecture utilizing extensive fiber optics; and, that as of June 2, 1993, approximately 6% of the rebuild has already been completed.

[2] CCC lists the following stations: KBBL, KEEF, KHIZ, KLCS, KMEX, KRCA, KRPA, KSCI, KSTV, KTBN, KVCR, KVEA, KVMD, KWHY, KZKI.

[3] CCC's petition appeared on public notice on July 2, 1993. RPV's opposition was filed on September 9, 1993 and KSLS filed its opposition on January 5, 1994, both of which were more than twenty days after CCC's petition appeared on public notice. Accordingly, pursuant to 47 C.F.R. § 76.7(d), these oppositions are late-filed. KSLS has filed a Motion for Acceptance of the opposition, claiming, among other things, that it was unaware of the request to remove the Orange County communities served by Dimension from KSCI's market for purposes of the must-carry requirements. In its response, CCC requests that RPV's and KSLS's oppositions be dismissed because they were not timely filed. While we caution all parties of the need to meet our procedural filing requirements, we will grant KSLS' motion, and we will accept all pleadings filed in this matter, out of our interest in resolving the case on a complete record. *See, e.g., Complaint of Central Virginia Educational Telecommunications Corporation against District Cablevision Limited Partnership*, 8 FCC Rcd 5252 (1993).

[4] Pub. L. No. 102-385, 106 Stat. 1460 (1992).

[5] 8 FCC Rcd 2965, 2976-2977 (1993).

[6] Section 4 of the 1992 Cable Act specifies that a commercial broadcasting station's market shall be determined in the manner provided in § 73.3555(d)(3)(i) of the Commission's Rules, as in effect on May 1, 1991. This section of the rules, now redesignated § 73.3555(e)(3)(i), refers to Arbitron's ADI for purposes of the broadcast multiple ownership rules. Section 76.55(e) of the Commission's Rules provides that the ADIs to be used for purposes of the initial implementation of the mandatory carriage rules are those published in Arbitron's 1991-1992 *Television Market Guide*.

[7] Because of the topography involved, certain counties are divided into more than one sampling unit. Also, in certain circumstances, a station may have its home county assigned to a separate ADI of its own, even though stations from another market have a preponderance of the audience in that county. For a more complete description of how counties are allocated, *see* Arbitron's *Description of Methodology*.

In considering such requests, the 1992 Cable Act provides that:

> the Commission shall afford particular attention to the value of localism by taking into account such factors as--
>
> (I) whether the station, or other stations located in the same area, have been historically carried on the cable system or systems within such community;
>
> (II) whether the television station provides coverage or other local service to such community;
>
> (III) whether any other television station that is eligible to be carried by a cable system in such community in fulfillment of the requirements of this section provides news coverage of issues of concern to such community or provides carriage or coverage of sporting and other events of interest to the community; and
>
> (IV) evidence of viewing patterns in cable and noncable households within the areas served by the cable system or systems in such community.[8]

4. The legislative history of this provision indicates that:

> where the presumption in favor of ADI carriage would result in cable subscribers losing access to local stations because they are outside the ADI in which a local cable system operates, the FCC may make an adjustment to include or exclude particular communities from a television station's market consistent with Congress' objective to ensure that television stations be carried in the areas which they serve and which form their economic market.
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> * * * * *
>
> [This subsection] establishes certain criteria which the Commission shall consider in acting on requests to modify the geographic area in which stations have signal carriage rights. These factors are not intended to be exclusive, but may be used to demonstrate that a community is part of a particular station's market.[9]

5. The Commission provided guidance in MM Docket 92-259, supra, to aid decision making in these matters, as follows:

> For example, the historical carriage of the station could be illustrated by the submission of documents listing the cable system's channel line-up (*e.g.*, rate cards) for a period of years. To show that the station provides coverage or other local service to the cable community (factor 2), parties may demonstrate that the station places at least a Grade B coverage contour over the cable community or is located close to the community in terms of mileage. Coverage of news or other programming of interest to the community could be demonstrated by program logs or other descriptions of local program offerings. The final factor concerns viewing patterns in the cable community in cable *and* noncable homes. Audience data clearly provide appropriate evidence about this factor. In this regard, we note that surveys such as those used to demonstrate significantly viewed status could be useful. However, since this factor requires us to evaluate viewing on a community basis for cable and noncable homes, and significantly viewed surveys typically measure viewing only in noncable households, such surveys may need to be supplemented with additional data concerning viewing in cable homes.[10]

6. In adopting rules to implement this provision, the Commission indicated that changes requested should be considered on a community-by-community basis rather than on a county-by-county basis, and that they should be treated as specific to particular stations rather than applicable in common to all stations in the market.[11] The rules further provide, in accordance with the requirements of the 1992 Cable Act, that a station not be deleted from carriage during the pendency of an ADI change request.[12]

MARKET FACTS AND ARGUMENTS OF THE PARTIES

7. According to CCC, Dimension serves 42,292 customers in the cities of Newport Beach, Irvine, Tustin, and Orange, California; the University of California, Irvine; and the Marine Corps Air Stations in Tustin and El Toro, all of which are located in Orange County in the southwestern portion of the Los Angeles ADI. Dimension states that it carries eight and one-half local commercial stations and two local noncommercial educational stations, and that under the must-carry rules it is required to add four and one-half commercial broadcast signals and possibly up to three more noncommercial stations.[13] CCC claims that, in order to accommodate these must-carry channels, Dimension will have to delete or reduce more popular national cable network programming, both entertainment programming and news and public affairs, "the core of speech protected by the First Amendment," as well as reduce community affairs information carried on the local origination channel, "all to the dissatisfaction of the overwhelming majority of Dimension's subscribers." CCC claims that Dimension will be forced to delete The Movie Channel and Continuous Hits 1, and to reduce to part-time carriage a number of public service oriented programming, such as the local origination channel, C-SPAN, and The Weather Channel, as well as other entertainment programming.

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[8] 47 U.S.C. §534(h)(1)(C)(ii).
[9] H.R. Rep. 102-628, 102d Cong., 2d Sess. 97 (1992).
[10] *Id.* at 2977 (emphasis in original).
[11] *MM Docket 92-259*, 8 FCC Rcd at 2977, 2977 n.139.
[12] 47 C.F.R. § 76.59.
[13] CCC explains that Dimension carries approximately one-half of the programming of KWHY and that it would be forced to carry the rest under Section 76.62(a) of the Commission's rules. Section 76.62(a) requires cable operators to carry the entirety of the program schedule of any television station carried unless carriage of specific programming is prohibited, and other programming authorized to be substituted, under section 76.67 or subpart F of Part 76 of the rules.

8. In support of its petition, CCC has submitted results of consumer surveys it conducted in the relevant cable market designed to "measure the desirability to its subscribers of the four and one-half signals (KMEX, KSCI, KTBN, KVEA, and KWHY) that it currently plans to add to fulfill its must-carry obligations." CCC claims that the results of the surveys show a very low interest in these signals, especially in comparison with the cable programming that they would displace. According to CCC, to its knowledge, none of these stations has sizable off-air viewership within the communities served by Dimension, none is significantly viewed, and none has been historically carried on Dimension's cable system. CCC argues that, since Dimension is currently carrying local programming,[14] in addition to the local programming available on the eight and one-half local commercial and two local noncommercial educational stations, there is ample opportunity for subscribers to have access to a very wide variety of local programming. CCC believes that by granting the relief requested, the Commission would be furthering the goals of Congress in the 1992 Cable Act by promoting the availability of a diversity of views and information, citing Section 2(b) of the Cable Act.

9. CCC also argues that, as applied to this case, the must-carry rules "inhibit the exercise by Dimension of editorial discretion consistent with its status as a First Amendment-protected speaker." According to CCC,

> [b]ecause carriage of the broadcast stations in question on Dimension's system would not further the goal of increasing programming of truly local concern and interest to the vast majority of Dimension's audience, and will reduce the amount of national news and public affairs programming and local community affairs and weather information available to Dimension's subscribers, there is no reason to interfere with Dimension's First Amendment rights by requiring Dimension to carry the speech of these must-carry stations.

CCC maintains that, because there is no compelling or substantial state interest in limiting Dimension's speech, there can be no justification for applying the must-carry rules in this instance.

10. CCC also claims that the must-carry obligations are particularly onerous in large television markets such as the Los Angeles ADI, especially for systems, such as Dimension's, with channel capacities of "just barely over the 37 channel threshold requiring carriage of *all* nonduplicative noncommercial stations that request carriage." CCC states that the Los Angeles ADI contains 21 commercial broadcast stations and five noncommercial educational stations, and that Dimension would potentially be required to carry three more noncommercial stations and to set aside 13 channels for carriage of qualified commercial stations. Because it would be deprived of nearly 50% of its channel capacity (and even more once its leased access, and public, educational, and governmental access requirements are considered) before it has the opportunity to exercise any editorial discretion over how best to serve the needs of its subscribers, CCC believes that the must-carry rules as applied in this instance are inconsistent with the First Amendment.

11. In its opposition, Trinity first disputes CCC's argument that its First Amendment rights have been infringed. Trinity notes that in *Turner Broadcasting System, Inc. v. FCC*, 819 F. Supp. 32 (D.D.C. 1993), the court upheld the Cable Act against near identical constitutional arguments, stating that "the must carry provisions are essentially economic regulation designed to create competitive balance in the video industry as a whole, and to redress the effects of cable operators' anti-competitive practices." *Id.* at 40. Specifically, notes Trinity, in Orange County, Dimension's monopoly power prevents KTBN-TV from reaching the majority of KTBN-TV's community of license, Santa Ana, because over 50% of the television households in Santa Ana have cable service, and when the cable goes in, the consumer's receive antenna is removed or disabled. Trinity also points out that the programming that Dimension wishes to continue is The Movie Channel and Continuous Hits 1, which channels do not provide unique programming of local interest and concern. Further, the five signals that Dimension would add upon deletion of these services (KTBN, KSCI, KWHY, KMEX, and KVEA) are diverse and would increase the quantity of services and speech available to the public.

12. Trinity also criticizes CCC's use of the survey results as evidence in support of its petition. First, Trinity points out that KWHY, a station devoted to business information, was not included in the survey. Further, KRCA-TV, despite receiving the lowest ratings in the survey, will be carried, while KTBN-TV, with higher results, will not be carried.[15]

13. Trinity maintains that Dimension's claims that denial of its request would injure its right to communicate under the constitution is counter-balanced by the individual stations' corresponding right to communicate as guaranteed by the Cable Act. Because interference with statutorily protected rights of expression constitutes irreparable injury, argues Trinity, granting CCC's requested relief would cause irreparable injury to KTBN-TV.[16]

14. In its opposition, KMEX first notes that nothing in the Communications Act permits the Commission to exempt CCC from the rules or to grant it a waiver. Further, KMEX argues that, under its alternative proposal, CCC would discriminate against KMEX by excluding KMEX from carriage on its system while continuing to carry other stations licensed to the same Los Angeles community. KMEX maintains that this discrimination is espe-

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[14] CCC asserts that Dimension carries the following additional local programming: (1) Orange County News, a 24-hour per day cable channel which provides coverage of stories of local interest; (2) 24:/54:, a joint venture between KCAL, the Orange County Edition of *The Los Angeles Times*, and most local Orange County cable operators, that provides five minute inserts of news of local interest to Orange County residents during CNN Headline News; and, (3) local origination programming such as live coverage of the City Council meetings of Irvine, Newport Beach, and Tustin, and local community events such as University of California, Irvine basketball games.

[15] Trinity notes that although KTBN-TV has not been on Dimension's system and is thus probably unknown to its subscribers, it received a 15% interest rating.

[16] Trinity cites Vol. 7, Pt. 2 Moore's 31 (1992, 93 Cum. Supp.) and *Arcamuzi v. Continental Air Lines, Inc.*, 819 F.2d 935, 939 (9th Cir. 1987).

cially troublesome because KMEX is a Spanish-language station that serves a substantial minority Hispanic population. In addition, argues KMEX, CCC's "minimal showing is far from adequate to warrant denial of must carry status to KMEX under the criteria enumerated in the Commission's *Report and Order*."

15. In its opposition, RPV explains that, as it is not yet on the air, it is not yet in a position to demand carriage on Dimension's cable system. RPV does oppose, however, CCC's attempt to keep KMEX-TV off the system and objects to CCC's "anti-minority attitude."[17] In its response, CCC claims that RPV's opposition provides no new information, improperly mischaracterizes CCC's accurate use of data, and objects to RPV's baseless accusations of racism.

16. In its opposition, KSLS argues that the Commission lacks authority to exempt cable systems from the statutory requirement that it carry up to one-third of its capacity with local commercial stations. KSLS also argues that CCC has failed to show that compliance with its must carry obligations would result in hardship, and that, in any case, a showing of hardship is irrelevant.

ANALYSIS AND DECISION

17. First, we will deny CCC's request for a waiver or an exemption. Whereas the Commission may waive its rules, it may not generally waive a provision of the statute.[18] CCC has not set forth arguments here justifiying such an action with specific citations to the applicable statutory provisions and judicial precedents. We also note that the constitutionality of the must-carry rules was upheld by a special three-judge panel of the District Court for the District of Columbia.[19] On appeal, the Supreme Court vacated the decision and remended the case back to the District Court for further proceedings.[20] While the case is pending, the must-carry provisions of the 1992 Cable Act remain in effect, as do the Commission's must-carry rules. Because this issue is currently being resolved by the court, no challenge to the constitutionality of these rules is appropriate here.

18. With respect to CCC's request for modification of the Los Angeles ADI, we find that CCC has provided insufficient evidence to support granting that request. The Cable Act allows the Commission to include or exclude particular communities from a television station's market to ensure that a television station is carried in the areas which it serves and which form its economic market. In the *Report and Order*, the Commission noted that it would permit joint filings by a group of stations or a single request from a cable operator for changes for more than one station licensed to the same community, "as long as the submitted information demonstrates that each station is entitled to have its market modified."[21] CCC has failed to provide documented evidence regarding each particular television station for which it requests a market modification. CCC merely states that "to its knowledge" none of the stations had been historically carried on Dimension's cable system. Further, CCC does not even maintain that the listed stations do not provide coverage or other local service to their communities, but rather merely complains that it will have to delete cable programming that, according to CCC, provides public affairs and news programs, and will have to reduce community affairs information carried on the local origination channel. With respect to evidence of viewing patterns in cable and noncable households in the cable communities, CCC has not provided the Commission with any information, other than that, again, "to its knowledge" none of the stations has sizable off-air viewership within the communities served by Dimension and that none is significantly viewed.

ORDER

19. In view of the foregoing, we find that grant of the petition is not in the public interest.

20. Accordingly, it IS ORDERED, pursuant to Section 614(h) of the Communications Act of 1934, as amended, 47 U.S.C. § 534, and Section 76.59 of the Commission's Rules, 47 C.F.R. § 76.59, that the captioned petition for special relief filed on June 2, 1993 by Community Cablevision Company d/b/a Dimension Cable Services IS DENIED. Its petitions having been denied, CCC shall comply with the applicable provisions of the Section 614 of the Communications Act and the associated rules within sixty (60) days of the release of this Order. CCC shall also notify all of the stations listed in its Petition of the outcome of this decision within fifteen (15) days of the release of this Order.

21. This action is taken pursuant to authority delegated by §0.321 of the Commission's Rules, 47 C.F.R. §0.321.

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson
Deputy Chief, Cable Services Bureau

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[17] KMEX-TV provides full-time Spanish language programming and KRPA-TV intends to provide programming of special interest to Asian Americans.

[18] *Johnson v. Robinson*, 415 U.S. 361, 368 (1974).

[19] *Turner Broadcasting System, Inc. v. FCC*, 819 F. Supp. 32 (1993).

[20] *Turner Broadcasting Systems, Inc. v. FCC*, 114 S. Ct. 2445 (1994).

[21] *Report and Order* at ¶ 47 n.139.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re:

Cook Inlet Communications, Inc. CSR-3827-A
New Haven, Connecticut

For Modification of the Hartford-New Haven, Connecticut ADI

MEMORANDUM OPINION AND ORDER

Adopted: March 17, 1995; Released: March 24, 1995

By the Cable Services Bureau:

INTRODUCTION

1. Cook Inlet Communications Corp., licensee of Station WTNH-TV (ABC, Channel 8), New Haven, Connecticut, has filed a petition for special relief seeking to include the communities located in Fairfield County, Connecticut, in the Hartford-New Haven ADI for purposes of the Commission's mandatory signal carriage rules.[1] This request is unopposed.[2]

BACKGROUND

2. Pursuant to §4 of the Cable Television Consumer Protection and Competition Act of 1992 ["1992 Cable Act"][3] and implementing rules adopted by the Commission in its *Report and Order in MM Docket 92-259*,[4] a commercial television broadcast station is entitled to assert mandatory carriage rights on cable systems located within the station's market. A station's market for this purpose is its "area of dominant influence," or ADI, as defined by the Arbitron audience research organization.[5] An ADI is a geographic market designation that defines each television market exclusive of others, based on measured viewing patterns. Essentially, each county in the United States is allocated to a market based on which home-market stations receive a preponderance of total viewing hours in the county. For purposes of this calculation, both over-the-air and cable television viewing are included.[6]

3. Under the Act, however, the Commission is also directed to consider changes in ADI areas. Section 614(h) of the 1992 Cable Act provides that the Commission may:

> with respect to a particular television broadcast station, include additional communities within its television market or exclude communities from such station's television market to better effectuate the purposes of this section.

In considering such requests, the Act provides that:

> the Commission shall afford particular attention to the value of localism by taking into account such factors as--
>
> (I) whether the station, or other stations located in the same area, have been historically carried on the cable system or systems within such community;
>
> (II) whether the television station provides coverage or other local service to such community;
>
> (III) whether any other television station that is eligible to be carried by a cable system in such community in fulfillment of the requirements of this section provides news coverage of issues of concern to such community or provides carriage or coverage of sporting and other events of interest to the community; and
>
> (IV) evidence of viewing patterns in cable and noncable households within the areas served by the cable system or systems in such community.[7]

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[1] Cook explains that there are thirty-five communities in Fairfield County, which are served by five cable systems. The Bridgeport system serves the Fairfield County communities of Bridgeport, Fairfield, Southport, and Stratford. The Norwalk system serves the Fairfield County communities of Cos Cob, Darien, Easton, East Norwalk, Georgetown, Greenwich, New Canaan, Norwalk, Old Greenwich, Redding, Redding Ridge, Riverside, Rowayton, South Norwalk, Stamford, Weston, Westport, West Redding, and Wilton. The Danbury system serves the Fairfield County communities of Bethel, Danbury, and Ridgefield. The Seymour system services the Fairfield County communities of Huntington and Shelton. Crown Cable's principal headend currently is being relocated from New Milford to Newtown. The Newtown system services the Fairfield County communities of Brookfield, Monroe, New Fairfield, Newtown, Sandy Hook, Sherman and Trumbull.

[2] On July 1, 1993, Cablevision of Connecticut, L.P. and Cablevision Systems of Southern Connecticut, L.P. ("Cablevision") filed comments in this proceeding. Cablevision maintains that Cook's petition, which Cablevision does not oppose, "reinforces Cablevision System Corporation's own Petition for Special Relief which, *inter alia*, seeks to exclude from must carry status on its Connecticut systems four stations that are geographically removed from the Fairfield County communities served by Cablevision; offer no programming with appeal beyond those stations' distinct local markets; and, in most cases, cannot be obtained or viewed off-air with a conventional home antenna." *See* Comments of Cablevision of Connecticut, L.P. and Cablevision Systems of Southern Connecticut, L.P. at 3 (filed July 1, 1993).

[3] Pub. L. No. 102-385, 106 Stat. 1460 (1992).

[4] 8 FCC Rcd 2965, 2976-2977 (1993).

[5] Section 4 of the 1992 Cable Act specifies that a commercial broadcasting station's market shall be determined in the manner provided in § 73.3555(d)(3)(i) of the Commission's Rules, as in effect on May 1, 1991. This section of the rules, now redesignated § 73.3555(e)(3)(i), refers to Arbitron's ADI for purposes of the broadcast multiple ownership rules. Section 76.55(e) of the Commission's Rules provides that the ADIs to be used for purposes of the initial implementation of the mandatory carriage rules are those published in Arbitron's 1991-1992 *Television Market Guide*.

[6] Because of the topography involved, certain counties are divided into more than one sampling unit. Also, in certain circumstances, a station may have its home county assigned to a separate ADI of its own, even though stations from another market receive a preponderance of the audience in that county. For a more complete description of how counties are allocated, *see* Arbitron's *Description of Methodology*.

[7] 47 U.S.C. §534(h)(1)(C)(ii).

4. The legislative history of this provision indicates that:

> where the presumption in favor of ADI carriage would result in cable subscribers losing access to local stations because they are outside the ADI in which a local cable system operates, the FCC may make an adjustment to include or exclude particular communities from a television station's market consistent with Congress' objective to ensure that television stations be carried in the areas which they serve and which form their economic market.
>
> * * * * *
>
> [This subsection] establishes certain criteria which the Commission shall consider in acting on requests to modify the geographic area in which stations have signal carriage rights. These factors are not intended to be exclusive, but may be used to demonstrate that a community is part of a particular station's market.[8]

5. The Commission provided guidance in *MM Docket 92-259, supra,* to aid decision making in these matters, as follows:

> For example, the historical carriage of the station could be illustrated by the submission of documents listing the cable system's channel line-up (e.g., rate cards) for a period of years. To show that the station provides coverage or other local service to the cable community (factor 2), parties may demonstrate that the station places at least a Grade B coverage contour over the cable community or is located close to the community in terms of mileage. Coverage of news or other programming of interest to the community could be demonstrated by program logs or other descriptions of local program offerings. The final factor concerns viewing patterns in the cable community in cable *and* noncable homes. Audience data clearly provide appropriate evidence about this factor. In this regard, we note that surveys such as those used to demonstrate significantly viewed status could be useful. However, since this factor requires us to evaluate viewing on a community basis for cable and noncable homes, and significantly viewed surveys typically measure viewing only in noncable households, such surveys may need to be supplemented with additional data concerning viewing in cable homes.[9]

6. In adopting rules to implement this provision, the Commission indicated that changes requested should be considered on a community-by-community basis rather than on a county-by-county basis, and that they should be treated as specific to particular stations rather than applicable in common to all stations in the market.[10] The rules further provide, in accordance with the requirements of the 1992 Cable Act, that a station not be deleted from carriage during the pendency of an ADI change request.[11]

7. Adding communities to a station's ADI generally entitles that station to insist on cable carriage in those communities. However, this right is subject to several conditions: 1) a cable system operator is generally required to devote no more than one-third of the system's activated channel capacity to compliance with the mandatory signal carriage obligations; 2) the station is responsible for delivering a good quality signal to the principal headend of the system; 3) indemnification may be required for any increase in copyright liability resulting from carriage; and 4) the system operator is not required to carry the signal of any station whose signal substantially duplicates the signal of any other local signal carried, or the signal of more than one local station affiliated with a particular broadcast network. If, pursuant to these requirements, a system operator elects to carry the signal of only one such duplicating signal, the operator is obliged to carry the station from the ADI whose city of license is closest to the principal headend of the cable system.[12] Accordingly, based on the specific circumstances involved, the addition of communities to a station's ADI may guarantee it cable carriage and specific channel position rights, or may simply provide the system operator with an expanded list of must-carry signals from which to choose (i.e., when the system has used up its channel capacity mandated for broadcast signal carriage, or determined which of duplicating network affiliated stations are entitled to carriage priority).

MODIFICATION ARGUMENTS

8. The communities in Fairfield County, Connecticut are considered to be part of the New York, New York area of dominant influence ("ADI"). WTNH-TV's Hartford-New Haven, Connecticut ADI includes every Connecticut county except for Fairfield, the reference point of the station's city of license is only 9.74 miles and its transmitter only 14.26 miles from the Fairfield County border, and virtually all of Fairfield County is located within WTNH-TV's Grade A contour.

9. In support of its petition, WTNH-TV states that it has been carried on all of the Fairfield County cable systems since those systems began operation.[13] It contends that it places a strong signal over all of Fairfield County, covering most of the county with city grade service and the remaining portion with a Grade A signal. Further, WTNH-TV notes that its local newscasts routinely cover stories and sports events relative to Fairfield County.[14] The station also provides coverage of Connecticut events not provided by the New York City stations which already have must-carry

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[8] H.R. Rep. 102-628, 102d Cong., 2d Sess. 97 (1992).

[9] *Id.* at 2977 (emphasis in original).

[10] *MM Docket 92-259*, 8 FCC Rcd at 2977, 2977 n.139.

[11] 47 C.F.R. § 76.59.

[12] *MM Docket 92-259*, 8 FCC Rcd at 2981.

[13] Bridgeport: since 1977; Norwalk: since 1982; Newtown: since 1978; Danbury: since 1972; Seymour: since 1972. WTNH-TV notes that it already has must-carry status with respect to the Bridgeport and Seymour systems because those systems also serve communities within the Hartford-New Haven ADI. *See Report and Order* at ¶ 41. By including all the communities in the county, WTNH-TV seeks to ensure that neither of these two systems would, in the future, threaten its access to its viewers through technical reconfigurations.

[14] WTNH-TV states that it carried nearly forty stories originating in Fairfield County communities in one recent six-week period and that its programming includes investigative reports and news series, in addition to coverage of breaking news. In addition, WTNH-TV states that it broadcasts University of Connecticut men's basketball games and reports on the sports teams

status on Fairfield County systems and several of its news personnel are active in Fairfield County affairs. According to WTNH-TV, Fairfield County viewers are dependent upon Connecticut stations such as WTNH-TV for their coverage of state-wide matters of interest. With respect to viewing patterns, WTNH-TV claims that it is now and has been the second most-watched television station both in cable and noncable homes in Fairfield County during time periods when non-network programming is shown, its newscasts are the highest-rated Connecticut newscasts among all county viewers, cable and noncable, and its morning news program is the highest-rated program in its time period, consistently garnering over one-third of all households in the county. In support, WTNH-TV submits 1991, 1992 and 1993 Nielsen Household Rating/Share data for Fairfield County for the five time periods programmed by WTNH-TV with locally-produced or syndicated programming. WTNH-TV notes that during the remaining time periods, which carry programming from the ABC Television Network, it also attracts a substantial number of Fairfield County viewers.[15]

DISCUSSION

10. WTNH-TV's petition is consistent with the applicable standards and will be granted. The communities in question are close geographically to WTNH-TV's community of license and transmitter, are well within its service area, and are logically part of its market area. WTNH-TV has shown Grade A coverage to all of the Fairfield communities. We have previously stated that this is sufficient to demonstrate coverage or other local service.[16] WTNH-TV has demonstrated a long history of carriage on the cable systems serving the above communities. It has further provided information as to a lack of specific coverage of local events, sports or news in these communities by other stations presently eligible to assert mandatory carriage rights on cable systems serving these communities. And finally, the available evidence of cable and noncable household viewing patterns for Fairfield County indicates wide-spread viewership of WTNH-TV.[17]

ORDER

11. In view of the foregoing, we find that grant of WTNH-TV's petition is in the public interest.

12. Accordingly, it IS ORDERED, pursuant to §614(h) of the Communications Act of 1934, as amended, 47 U.S.C. §534, and §76.59 of the Commission's Rules, 47 C.F.R. §76.59, that the captioned petition for special relief filed May 24, 1993, by Cook Inlet Communications Corp. IS GRANTED. This change shall be effective in accordance with the following schedule: Cook shall notify the cable systems in question in writing of its carriage and channel position elections, see 47 C.F.R. §§ 76.56, 76.57, 76.64(f), within thirty (30) days of the release date of this *Memorandum Opinion and Order*. The affected cable systems shall come into compliance with the applicable rules within 60 days of such notification.

13. This action is taken pursuant to authority delegated by §0.321 of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson
Deputy Chief, Cable Services Bureau

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of the University of Bridgeport, Fairfield University, Sacred Heart University and many of the high school teams in Fairfield County. WTNH-TV notes that, except for certain occasions, no Connecticut sports team has their games broadcast on New York stations and reports on teams in Fairfield County are "virtually nonexistent on New York stations."

[15] We note that data from Arbitron's 1992 *County Coverage Survey*, Standard/Fringe Volume, which shows a 9% total county share, and a 50% total net weekly circulation, in cable and noncable households, confirms WTNH-TV's contention. We also note that, although the data is county-based, rather than community-specific, absent evidence that such data is not fairly reflective of viewing in the actual communities in question, we shall accept such data as probative, though not conclusive.

[16] *MM Docket 92-259*, 8 FCC Rcd at 2977. *See also* paragraph 5, *supra*.

[17] This determination is subject to all generally applicable limitations on signal carriage rights, including copyright liability, channel capacity, and program duplication. *See* paragraph 7, *supra*.

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER

Released: February 13, 1995

In the Matter of

Daniels Communications Partners, d/b/a Hawaiian Cablevision Company, et al., PA95-009

v.

GTE Hawaiian Telephone Company

Mr. David J. Gudino
Attorney
GTE Hawaiian Telephone Company Incorporated
1850 M Street, N.W.
Suite 1200
Washington, D.C. 20036

Dear Mr. Gudino:

On February 10, 1995, you filed a request for an extension of time for GTE Hawaiian Telephone Company Incorporated (GTE) to file a response to the pole attachment complaint filed by Daniels Communications Partners d/b/a/ Hawaiian Cablevision Company, et al.(Daniels), PA 95-009.

You state that good cause exists for granting GTE an extension until February 21 in which to file its response. GTE and the parties to this complaint as well as the parties to the other pole attachment complaints pending against GTE will be discussing the possibility of a global settlement of all the complaints next week. Because of these settlement discussions GTE believes that an extension would promote administrative efficiency and would further the public interest. You also state that the complainants are not opposed to this extension request.

After careful consideration we believe that GTE has shown good cause to justify the grant of an extension of time. Therefore, GTE has until February 21, 1995 to file its response in the above referenced complaint.

Sincerely,

Kenneth P. Moran
Chief, Accounting and Audits Division

cc: All Parties

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Century Cable of Northern California
Ventura, California — CUID Nos. CA0024, CA0755

Order Denying Jurisdiction

MEMORANDUM OPINION AND ORDER

Adopted: February 14, 1995; Released: February 15, 1995

By the Deputy Chief, Cable Services Bureau:

1. In this Order we dismiss complaints against the prices Century Cable of Northern California ("Century") was charging for its cable programming service ("CPS") tiers in the City of Ventura, California, CUID No. CA0024, and in the County of Ventura, California, CUID No. CA0755, on the ground that the complaints concern rates that are outside the jurisdiction and authority of this Commission. As explained below, the Commission regulates rates for CPS only, and then only upon filing of a valid complaint. Our review reveals that the complaints filed against Century, while asserting that they challenge CPS rates, challenge only rates for basic service, not for CPS. The complaints therefore do not trigger the Commission's jurisdiction, and they are accordingly dismissed.

2. The Cable Television Consumer Protection and Competition Act of 1992 ("Cable Act of 1992")[1] distinguishes among basic cable service, premium cable service, and cable programming service.[2] The basic service tier is the minimum package of cable service that a consumer can buy. Except in limited circumstances, the Commission does not have jurisdiction over rates for the basic service tier, and cannot act upon complaints concerning rates for that tier. Premium cable service consists of channels that are paid for individually (per-channel) or per-program. By statute, these channels are not subject to rate regulation. CPS includes all video programming that is not on the basic service tier which the operator offers as a package of channels. Rates for CPS tiers are subject to regulation by the Commission in response to a valid complaint.

3. Century filed motions to dismiss all the complaints submitted in both the City and the County of Ventura on the ground that, in each case, the complainant subscribed only to basic cable service and did not subscribe to any CPS services. A review of the billing statements attached to the complaints supports this assertion.

4. The complaints under consideration here were filed with the Commission on FCC Form 329. FCC Form 329 is used by subscribers or local franchising authorities wishing to lodge with the Commission a complaint about an operator's CPS rates. The form is entitled "Cable Programming Service Rate Complaint." While the form is designed for use in challenging CPS tier rates, the definition of CPS tier rates is not made clear on the face of the form and it is possible that someone might complete the form without understanding the difference between basic tier rates, premium service rates, and CPS tier rates.[3]

5. We have examined the complaints and Century's responses, and we conclude that the complaints challenge only basic rates, not CPS rates. Although the complainants indicate that the rates challenged violate the Commission's rules, the specific information provided by the complainants indicates that only basic rates are at issue. When only basic rates are being challenged, the complaint should properly be brought to the attention of the local franchising authority in the first instance, and not filed with this Commission. If the complaints do in fact challenge CPS rates, the complainants may file a petition for reconsideration providing information adequate to support their challenge.

6. Accordingly, IT IS ORDERED, pursuant to Section 623(a)(2)(A) and (B) of the Communications Act of 1934, as amended, 47 U.S.C. § 543(a)(2)(A) and (B), that the complaints filed prior to May 14, 1994 against the cable programming service prices charged by Century Cable of Northern California in the City of Ventura, California, CUID No. CA0024, and in the County of Ventura, California, CUID No. CA0755, ARE DISMISSED.

7. This action is taken pursuant to delegated authority under Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Deputy Chief, Cable Services Bureau

[1] Cable Television Consumer Protection and Competition Act, Pub. L. No. 102-385, 106 Stat. 1460 (1992) (Cable Act of 1992).

[2] Cable Act of 1992, Section 602, 47 U.S.C. § 522.

[3] We note that operators have great latitude in determining what channels will be included in the basic tier; once the statutory minimum (broadcast and public educational and governmental access channels) is met, the operator may include as many additional channels in the basic tier as it wants, or it may move additional channels to a higher tier. Thus it is possible that a complainant might not clearly understand which channels are part of which tier.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TCI Cablevision	CUID Nos. GA0268, IA0137,
City of Pearson, Georgia	IA0198, MD0005, MD0006,
City of Vinton, Iowa	MN0015, WI0289, WY0055
City of Eldon, Iowa	and WY0081
Town of Berlin, Maryland	
Town of Ocean City, Maryland	
City of Ely, Minnesota	
City of Columbus, Wisconsin	
Town of Wright, Wyoming	
Town of Moorcroft, Wyoming	

Order Denying Jurisdiction

MEMORANDUM OPINION AND ORDER

Adopted: February 14, 1995; Released: February 15, 1995

By the Deputy Chief, Cable Services Bureau:

1. In this Order we dismiss complaints against the price TCI Cablevision ("TCI") was charging for its cable programming service ("CPS") tier in the communities designated by the CUIDs referenced above, on the ground that the complaints concern rates that are outside the jurisdiction and authority of this Commission. As explained below, the Commission regulates rates for CPS only, and then only upon filing of a valid complaint. Our review reveals that the complaints filed against TCI, while asserting that they challenge CPS rates, challenge only rates for basic service, not for CPS. The complaints therefore do not trigger the Commission's jurisdiction, and they are accordingly dismissed.

2. The Cable Television Consumer Protection and Competition Act of 1992 ("Cable Act of 1992")[1] distinguishes among basic cable service, premium cable service, and cable programming service.[2] The basic service tier is the minimum package of cable service that a consumer can buy. Except in limited circumstances, the Commission does not have jurisdiction over rates for the basic service tier, and cannot act upon complaints concerning rates for that tier. Premium cable service consists of channels that are paid for individually (per-channel) or per-program. By statute, these channels are not subject to rate regulation. CPS includes all video programming that is not on the basic service tier which the operator offers as a package of channels. Rates for CPS tiers are subject to regulation by the Commission in response to a valid complaint.

3. As of September 1, 1993, TCI states that in the communities referenced above it only offers one tier of service.[3] The channel line-ups and rate cards that TCI submitted support this assertion.

4. .The complaints under consideration here were filed with the Commission on FCC Form 329. FCC Form 329 is used by subscribers or local franchising authorities wishing to lodge with the Commission a complaint about an operator's CPS rates. The form is entitled "Cable Programming Service Rate Complaint." While the form is designed for use in challenging CPS tier rates, the definition of CPS tier rates is not made clear on the face of the form and it is possible that someone might complete the form without understanding the difference between basic tier rates, premium service rates, and CPS tier rates.[4]

5. We have examined the complaints and TCI's response, and we conclude that the complaints challenge only basic rates, not CPS rates. Although the complainants indicate that the rates challenged violate the Commission's rules, the specific information provided by the complainants indicates that only basic rates are at issue. When only basic rates are being challenged, the complaint should properly be brought to the attention of the local franchising authority in the first instance, and not filed with this Commission. If the complaints do in fact challenge CPS rates, the complainants may file a petition for reconsideration providing information adequate to support their challenge.

6. Accordingly, IT IS ORDERED, pursuant to Section 623(a)(2)(A) and (B) of the Communications Act of 1934, as amended, 47 U.S.C. §543(a)(2)(A) and (B), that the complaints filed prior to May 14, 1994, against the cable programming service price charged by TCI Cablevision in Pearson, Georgia, CUID No. GA0268; Vinton, Iowa, CUID No. IA0137; Eldon, Iowa, CUID No. IA0198; Berlin, Maryland, CUID No. MD0005; Ocean City, Maryland, MD0006; Ely, Minnesota, CUID No. MN0015; Columbus, Wisconsin, CUID No. WI0289; Wright, Wyoming, CUID No. WY0055; and Moorcroft, Wyoming, WY0081, ARE DISMISSED.

7. This action is taken pursuant to delegated authority under Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Deputy Chief, Cable Services Bureau

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[1] Cable Television Consumer Protection and Competition Act, Pub. L. No. 102-385, 106 Stat. 1460 (1992) (Cable Act of 1992).

[2] Cable Act of 1992, Section 602, 47 U.S.C. § 522.

[3] Letter from Andrew C. Elson, TCI, to Julia C. Buchanan, FCC (January 5, 1995).

[4] We note that operators have great latitude in determining what channels will be included in the basic tier; once the statutory minimum (broadcast and public educational and governmental access channels) is met, the operator may include as many additional channels in the basic tier as it wants, or it may move additional channels to a higher tier. Thus it is possible that a complainant might not clearly understand which channels are part of which tier.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Withdrawal of FCC Form 329
Rate Complaints Against:

TCI Cablevision of Greater Michigan	MI0084 City of Alpena
American Cablevision	PA1775 Peyton C. Watkins
Paragon Cable	MN0200 Southwest Suburban Cable Commission
Multimedia Cablevision	IL1055 Village of Villa Park
TV Transmission Inc. d/b/a/ Lincoln Cablevision	NE0032 City of Lincoln
Charter Communications	GA0099 City of Manchester

MEMORANDUM OPINION AND ORDER

Adopted: February 14, 1995; Released: February 17, 1995

By the Deputy Chief, Cable Services Bureau:

1. In each of the cases noted above, the local franchising authority (LFA) or another complainant filed a complaint with this Commission alleging that the prices charged for cable programming service tier (CPS) services in its community were unreasonably high. These complaints, and the cable operators, complainants, and filing dates, are noted at Attachment A. Later, these complainants wrote to the Commission to withdraw their CPS complaints.[1] There was only one complainant who filed with this Commission in each of these communities. Our jurisdiction to regulate CPS rates arises with the filing of a valid complaint against those rates. We will allow the withdrawal of these complaints, and our review of these filings will therefore be terminated.

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.

3. The Commission's original rate regulations took effect on September 1, 1993.[5] The Commission subsequently revised its rate regulations effective May 15, 1994.[6] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[7] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[8] In each case captioned above, the operator did file either an FCC Form 393 benchmark rate justification submission, or a cost of service rate justification submission.

4. This Commission has now received from each of the captioned complainants a letter stating that it wishes to withdraw its CPSrate complaint against the operator. Under our rules, this Commission's authority to regulate CPS cable rates arises when a valid complaint against those rates is filed. In every case noted here, the complainant is the only complainant against this operator in this community. Our mandate is to "protect subscribers of any cable system that is not subject to effective competition from rates that exceed the rates that would be charged if such a system were subject to effective competition."[9] While our rules forbid collusive agreements between operators and local franchising authorities regarding forebearance from rate regulation, there is no evidence of such an agreement here. We will accordingly allow these complainants to withdraw their complaints. Because our review of the rate justification showings is predicated on the existence of a rate complaint, and because in every case listed here, the operator no longer faces a rate complaint, we are terminating our review of those filings.

5. Accordingly, IT IS ORDERED that permission to withdraw the FCC Form 329 rate complaints against cable programming service rates in the above-noted communities IS GRANTED, and the review of the resulting rate justification filings IS TERMINATED.

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[1] The dates of all withdrawal letters are noted in Attachment A.

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993) (Cable Act of 1992).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] Order in MM Docket No. 92-266, Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[6] *See* Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, MM Docket No. 92-266, Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, 9 FCC Rcd 4119 (1994) (*Benchmark Order*): 47 C.F.R. § 76.922(b).

[7] *See Benchmark Order*, 9 FCC Rcd at 4190, paras. 150-152.

[8] *Id.*

[9] Conference Report on the Cable Act of 1992, at 62. *See also*, Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, MM Docket No. 92-266, Report and Order and Further Notice of Proposed Rulemaking, 8 FCC Rcd 5631 (1993) (*Rate Order*) at 5669.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Deputy Chief, Cable Services Bureau

Attachment A

CPS Complaint Withdrawals

CUID No., Local Franchising Authority/Complainant	Operator	Complaints Filed[10]	Complaints Withdrawn
MI0084 City of Alpena	TCI Cablevision of Greater Michigan	10/08/93	09/09/94
PA1775 Peyton C. Watkins	American Cablevision	01/31/94	05/14/94
MN0200 Southwest Suburban Cable Commission	Paragon Cable	11/04/93	05/18/94
IL1055 Village of Villa Park	Multimedia Cablevision	11/15/93	10/25/94
NE0032 City of Lincoln	TV Transmission Inc. d/b/a/ Lincoln Cablevision	10/11/93	01/23/95
GA0099 City of Manchester	Charter Communications	12/09/94	01/09/95

[10] The date given is the date the complainant first filed a complaint. In some cases, the complainants filed duplicate complaints at later dates.

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
February 14, 1995

Released: February 15, 1995

VIA FACSIMILE AND FIRST CLASS U.S. MAIL

Peter H. Feinberg, Esq.
Dow, Lohnes & Albertson
1255 23rd Street, NW
Washington, DC 20037-1194

Re: FCC Form 1210 rate increases for Comcast Cablevision of Maryland

Dear Mr. Feinberg:

On January 13, 1995, Comcast Cablevision of Maryland ("Comcast") filed with the Cable Services Bureau a request for approval, on an expedited basis, of a proposed rate increase to its cable programming service (CPS) tier as computed on FCC Form 1210. In this request, Comcast states that the increase is necessary to allow Comcast to provide its subscribers with new programming. Because we found Comcast's rates to be unreasonable, obligating it to pay refunds to its CPS subscribers,[1] Comcast must obtain the Bureau's approval before it may increase its CPS tier rate. *See* FCC Form 1210, page 2.[2] This requirement allows us to monitor subsequent rate increases, once we have found rates unreasonable. Comcast states that the proposed programming and external cost increases are not dependent on the issues involved in the Bureau's Order imposing refund liabilities, and that approval should not be delayed on that account.

To date, we have undertaken a full review of Comcast of Maryland's rates only for the period prior to May 15, 1994, and have found those rates unreasonable. Our review of the reasonableness of Comcast's rates from May 15, 1994 to the present is currently underway. With respect to rates charged for the period beginning May 15, 1994, Comcast has filed FCC Forms 1200 and 1205. Comcast's current request for approval of FCC Form 1210 is for expenses incurred in the fourth quarter of 1994, and programming expenses to be accrued upon our approval. Comcast is requesting a CPS tier rate increase of $.55, $.28 in external costs and $.27 due to channels added under the new going forward rules.[3]

We have reviewed the Form 1210 filings before us, and find no patent defects. We believe that the impetus behind Comcast's request is to provide its subscribers with new programming in the above-noted communities, and that approval of Comcast's instant request will encourage this development. Our permitting the requested increases is on an interim basis only, and is subject to our determination of the reasonableness of Comcast's CPS rates for the period beginning May 15, 1994, including subsequent changes to the rates filed on Comcast's FCC Form 1200. Thus, although we allow the requested increase for new programming, the increased rate which Comcast may charge is potentially subject to refund if our review of Comcast's FCC Form 1200 and Form 1210 filings finds that Comcast's underlying CPS rate is unreasonable.

Sincerely,

Meredith J. Jones
Chief, Cable Services Bureau

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[1] *See* Order, DA 94-1153 (Cab. Serv. Bur., released Nov. 9, 1994).

[2] We note Dimension's argument that a refund liability for a past period does not constitute a finding that the operator's rates *are* unreasonable. We rely, however, on the broader interpretation permitted by the first sentence, "If the Commission found your rates to be unreasonable less than one year ago and you now wish to increase your rates...." We did find Dimension's rates unreasonable less than one year ago, and Dimension is accordingly correct in filing an FCC Form 1210 for approval of its proposed rate increase.

[3] *See* Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, MM Dockets No. 92-266 and 93-215, Sixth Order on Reconsideration, Fifth Report and Order, and Seventh Notice of Proposed Rulemaking, FCC 94-286 (released Nov. 18, 1994). Comcast has added one channel, totalling an increase of $.20, plus license fees of $.07.

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
Feburary 14, 1995

Released: February 15, 1995

Frank W. Lloyd, Esq.
Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C.
701 Pennsylvania Avenue, NW
Washington, DC 20004

Re: FCC Form 1210 rate increases for Times-Mirror Cable Television of Orange County, Inc. (d/b/a/ Dimension Cable Services)

Dear Mr. Lloyd:

On January 19, 1995, Times-Mirror Cable Television of Orange County, Inc., d/b/a Dimension Cable Services ("Dimension") filed with the Cable Services Bureau a request for approval, on an expedited basis, of a proposed rate increase to its cable programming service (CPS) tier as computed on FCC Form 1210. In this request, Dimension states that the increase is necessary due to Dimension's addition of new programming to the referenced systems' CPS tiers over the last three months, and that Dimension intends to implement these rate changes by March 1, 1995.[1] Because we found Dimension's rates to be unreasonable, obligating it to pay refunds to its CPS subscribers,[2] Dimension must obtain the Bureau's approval before it may increase its CPS tier rate. *See* FCC Form 1210, page 2.[3] This requirement allows us to monitor subsequent rate increases, once we have found rates unreasonable.

To date, we have undertaken a full review of Dimension's rates only for the period prior to May 15, 1994, and have found those rates unreasonable. Our review of the reasonableness of Dimension's rates from May 15, 1994 to the present is currently underway. With respect to rates charged for the period beginning May 15, 1994, Dimension has filed FCC Forms 1200 and 1205. Dimension's current request for approval of FCC Form 1210 is for expenses incurred in the fourth quarter of 1994. Dimension is requesting CPS tier rate increases of $1.30 or $1.31, as well as increases in basic tier, converter, and remote charges. The CPS rate increase has three components: $.20 is due to changes in external costs; $.98 is due to channels added under the new going forward rules;[4] the remainder is due to inflation adjustments.

We have reviewed the Form 1210 filings before us, and find no patent defects. We believe that the impetus behind Dimension's request is to provide its subscribers with new programming in the above-noted communities, and that approval of Dimension's instant request will encourage this development. Our permitting the requested increases is on an interim basis only, and is subject to our determination of the reasonableness of Dimension's CPS rates for the period beginning May 15, 1994, including subsequent changes to the rates filed on Dimension's FCC Form 1200. Thus, although we allow the requested increase for new programming, the increased rate which Dimension may charge is potentially subject to refund if our review of Dimension's FCC Form 1200 and Form 1210 filings finds that Dimension's underlying CPS rate is unreasonable.

Sincerely,

Meredith J. Jones
Chief, Cable Services Bureau

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[1] These filings concern Dana Point, CA (CUID CA0549); Laguna Hills, CA (CA1085); Laguna Niguel, CA (CA0316); Lake Forest, CA (CA1070); Mission Viejo, CA (CA1345); Orange County, CA (CA0184, CA1310, CA0675, CA0723, CA1243, CA0719, CA0194, CA0765, CA1205); San Clemente, CA (CA0193); and San Juan Capistrano, CA (CA0367).

[2] *See, e.g.*, DA 94-1334 (Cab. Serv. Bur., released Nov. 29, 1994).

[3] We note Dimension's argument that a refund liability for a past period does not constitute a finding that the operator's rates *are* unreasonable. We rely, however, on the broader interpretation permitted by the first sentence, "If the Commission found your rates to be unreasonable less than one year ago and you now wish to increase your rates...." We did find Dimension's rates unreasonable less than one year ago, and Dimension is accordingly correct in filing an FCC Form 1210 for approval of its proposed rate increase.

[4] *See* Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, MM Dockets No. 92-266 and 93-215, Sixth Order on Reconsideration, Fifth Report and Order, and Seventh Notice of Proposed Rulemaking, FCC 94-286 (released Nov. 18, 1994). Dimension has added three channels, totalling an increase of $.60, plus license fees of $.38.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

MID-TENNESSEE CABLE
LIMITED PARTNERSHIP
D/B/A HICKORY HILL CABLEVISION

Petition for Reconsideration

of the Certification of
City of Kingsport, Tennessee
to Regulate Basic Cable Rates
(TN0534)

MEMORANDUM OPINION AND ORDER

Adopted: February 14, 1995; Released: February 15, 1995

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. On November 19, 1993, Mid-Tennessee Cable Limited Partnership ("Mid-Tennessee") filed a timely petition for reconsideration challenging the certification of the City of Kingsport, Tennessee ("City") to regulate rates for basic cable service and associated equipment.[1] The City did not file an opposition to Mid-Tennessee's petition.

2. Section 623(a)(4) of the Communications Act of 1934, as amended, allows franchising authorities to become certified to regulate basic cable service rates of cable operators which are not subject to effective competition.[2] For purposes of the initial request for certification, local franchising authorities may rely on a presumption that cable operators within their jurisdiction are not subject to effective competition, unless they have actual knowledge to the contrary.[3] Certification becomes effective 30 days from the date of filing unless the Commission finds that the franchising authority does not meet the statutory certification requirements.[4] Cable operators may file petitions for reconsideration of the franchising authority's certification within 30 days from the date such certification becomes effective.[5] Petitions for reconsideration may allege that the cable operator is not subject to rate regulation because: (1) effective competition exists; or (2) the franchising authority does not meet the certification standards set forth in the 1992 Cable Act.[6] Rate regulation is automatically stayed pending review of a timely-filed petition for reconsideration alleging the presence of effective competition.[7]

II. DISCUSSION

3. Mid-Tennessee challenges the City's certification based on two grounds. First, Mid-Tennessee alleges that the City lacks the legal authority to regulate Mid-Tennessee's rates and therefore does not meet the certification standards. Specifically, it argues that under Tennessee law, a municipality cannot regulate a cable operator unless the municipality has granted that operator a franchise to provide cable television service,[8] Mid-Tennessee states that on November 20, 1987 and on December 7, 1991, certain unincorporated sections of Sullivan County, TN were annexed to the City. It states that it previously provided cable service to these sections pursuant to a franchise agreement with Sullivan County.[9] Mid-Tennessee maintains that it has continued service to these newly annexed areas but has not yet been granted a franchise from the City despite continued negotiations since 1987. As support for its factual contentions, Mid-Tennessee submits an affidavit from a responsible official which provides a chronology of events surrounding the annexation of portions of Sullivan County to the City. Based on these facts and its interpretation of Tennessee law, Mid-Tennessee argues that because it does not have a franchise with the City, the City does not have the requisite legal authority to regulate Mid-Tennessee's rates. Moreover, Mid-Tennessee argues that the Commission lacks the power to vest such regulatory authority in the City.[10]

4. In addition, Mid-Tennessee argues that even if it were subject to rate regulation by the City, its cable system is subject to effective competition because it serves fewer than 30 percent of the households in the City, its alleged franchise area.[11] Specifically, Mid-Tennessee claims that it

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[1] The City filed its "Certification of Franchising Authority to Regulate Basic Cable Service Rates and Initial Finding of Lack of Effective Competition" ("FCC Form 328") on September 20, 1993. The certification became effective on October 20, 1993.

[2] Communications Act of 1934 §623(a)(4), 47 U.S.C. §543(a)(4).

[3] 47 C.F.R. §§ 76.906, 76.910(b)(4).

[4] 47 C.F.R. § 76.910(e). Certification becomes effective unless the Commission determines that: (1) the franchising authority will not adopt or administer rate regulations that are consistent with the Commission's regulations; (2) the franchising authority lacks the legal authority to adopt, or the personnel to administer, rate regulations; (3) procedural laws and regulations applicable to rate regulation proceedings by the franchising authority do not provide a reasonable opportunity for consideration of the views of interested parties; or (4) the cable system in question is subject to effective competition.47 C.F.R. § 76.910(b). *See also* 47 U.S.C. § 543(a)(4).

[5] 47 C.F.R. §§ 1.106, 76.911; *Report and Order and Further Notice of Proposed Rulemaking*, MM Docket No. 92-266, 8 FCC Rcd 5631, 5693 (1993).

[6] 47 C.F.R. § 76.911.

[7] 47 C.F.R. § 76.911(c).

[8] Mid-Tennessee cites Tenn. Code Ann. § 7-59-102 (1977) for this proposition.

[9] *See* Mid-Tennessee Petition at 2-3; October 29, 1987 Memorandum from Jeff Fleming, Planner, to Joe May, City Attorney; November 23, 1987 Memorandum from Jeff Fleming, Planner.

[10] Mid-Tennessee Petition at 4, citing *Rate Order*, 8 FCC Rcd 5631, at ¶ ¶ 65-66.

[11] The 1992 Cable Act (Communications Act of 1934 § 623(a)(2), 47 U.S.C. § 543(a)(2) and the Commission rules (47 C.F.R. § 76.905(a)) provide that only the rates of cable systems that are not subject to effective competition may be regulated. One of the bases by which a cable operator will be deemed subject to effective competition is if fewer than 30 percent of the households in the system's franchise area subscribe to the cable service of the cable system. Communications Act of 1934 § 623(l)(1)(A), 47 U.S.C. § 543(l)(1)(A); 47 C.F.R. § 76.905(b)(1).

serves only 251 of the 16,742 households (that is, occupied housing units)[12] in the City, or 1.5 percent of the total number of households. As supporting documentation, Mid-Tennessee provides the affidavit of a responsible official at Mid-Tennessee, and correspondence between officials at Mid-Tennessee and the City. The affidavit gives a chronology of events surrounding the annexation of portions of Sullivan County to the City, states the 1990 census data for "homes" in the City,[13] and states the number of subscribers to Mid-Tennessee's system within the City. The correspondence relates to discussions between Mid-Tennessee and the City regarding a franchise agreement for cable services.

5. First, we can not find that Mid-Tennessee is subject to effective competition. In the absence of a demonstration to the contrary, cable systems are presumed not to be subject to effective competition.[14] The cable operator bears the burden of rebutting the presumption that effective competition does not exist with evidence that effective competition, as defined by Section 76.905 of the Commission's rules, is present within the franchise area.[15] Mid-Tennessee has failed to meet this burden. The Communications Act of 1934, as amended, and the Commission's rules require that claims of effective competition be based on the franchise area.[16] The Commission has stated that generally, a "franchise area" "is the area a system operator is granted authority to serve in its franchise."[17] Mid-Tennessee's effective competition claim is apparently based on the total number of "housing units" within the entire City of Kingsport. However, as Mid-Tennessee does not have operating rights for the City of Kingsport as a whole, its comparison of subscribers that it serves to the number of households in Kingsport cannot be relied on. Accordingly, its effective competition claim must be denied.

6. As to the legal authority of the City of Kingsport to engage in rate regulation with respect to this system, we are not persuaded that such authority does not exist. While the manner in which any such authority may be exercised remains in dispute and subject to negotiation between Mid-Tennessee and the City of Kingsport, the absence of a current franchise agreement does not necessarily indicate that such authority ultimately is lacking. We note, however, that the City did not file an opposition to Mid-Tennessee's petition. The record is thus left somewhat incomplete. Given the situation, we are not persuaded that this is yet a situation where the Commission would be required to assume jurisdiction under Section 76.911(e) of its rules.[18] Accordingly, if at such time as the City attempts to exercise its authority, Mid-Tennessee continues to dispute the legal authority of the City, a petition for revocation pursuant to Section 76.914 of the Commission's rules[19] could then properly be filed with the issues more properly joined.

III. ORDERING CLAUSES

7. Accordingly, IT IS ORDERED that the petition for reconsideration filed by Mid-Tennessee Cable Limited Partnership, challenging the certification of the City of Kingsport, Tennessee to regulate Mid-Tennessee's basic cable service rates IS DENIED.

8. IT IS FURTHER ORDERED that the automatic stay imposed by Section 76.911(c) of the Commission's Rules, as amended, 47 C.F.R. § 76.911(c) IS TERMINATED.

9. This action is taken pursuant to delegated authority under Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

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[12] Both the Cable Act and the Commission's rules require that effective competition be demonstrated based on the number of "households" in the franchise area. Communications Act of 1934 § 623(l)(1), 47 U.S.C. § 543(l)(1); 47 C.F.R. § 76.905 (b). As the Commission stated recently, "we presume that Congress did not intend 'households' to have a different meaning than in the 1990 Census that would include vacant units." *Third Order on Reconsideration*, MM Docket Nos. 92-266 and 92-262, 9 FCC Rcd 4316, 4324 (1994) (*"Third Recon. Order"*). The count of "households" in the 1990 Census reflects only occupied housing units. *See* Bureau of the Census, U.S. Dept. of Commerce, 1990 Census of Population, CP-1-1B, Appendix B at B-8.

[13] The 1990 census indicates that there are 16,742 housing units in the City.

[14] 47 C.F.R. § 76.906.

[15] 47 C.F.R. § 76.911.

[16] Communications Act of 1934 § 623(l)(1), 47 U.S.C. § 543(l)(1); 47 C.F.R. § 76.905(b).

[17] *First Order on Reconsideration, Second Report and Order, and Third Notice of Proposed Rulemaking*, in MM Docket No. 92-266, 9 FCC Rcd 1164, 1180 (1993).

[18] 47 C.F.R. § 76.911(e). This rule requires that, in cases where the Comission upholds a certification challenge alleging the failure of the franchising authority to meet the certification requirements (*i.e.*, legal authority to regulate rates), the Commission must notify the franchising authority of the revisions necessary to secure approval of certification and provide the franchising authority an opportunity to amend its certification in order to secure approval. However, pending approval of the franchising authority's certification, the Commission must assume jurisdiction over basic cable service rates in that franchise area.

[19] 47 C.F.R. § 76.914.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Rochester Telephone Corporation,
Mid-South Telecommunications Company, Inc.,
Ontonagon County Telephone Company and
Midway Telephone Company

Petition for Waiver of Sections 61.41(c),
61.41(d), 69.3(e)(11) and 69.3(i)(4) of the
Commission's Rules

ORDER

Adopted: February 14, 1995; Released: February 15, 1995

By the Chief, Common Carrier Bureau:

1. On October 3, 1994, Rochester Telephone Corporation (Rochester), Mid-South Telecommunications Company, Inc. (Mid-South), Ontonagon County Telephone Company (Ontonagon) and Midway Telephone Company (Midway) (collectively, Petitioners) filed a joint petition for waiver of Sections 61.41(c), 61.41(d), 69.3(e)(11) and 69.3(i)(4) of the Commission's rules[1] in conjunction with the proposed sale of Ontonagon and Midway by Rochester to Mid-South. The rule waiver would allow Ontonagon and Midway to withdraw from price cap regulation and become subject to cost-of-service regulation, and place Ontonagon and Midway in the National Exchange Carrier Association (NECA) pools effective on the date of their acquisition by Mid-South.

2. Petitioners state that Rochester is a New York corporation that provides local exchange service to approximately 500,000 access lines in western central New York, and additionally owns 35 local exchange carriers that serve approximately 480,000 access lines in thirteen states.[2] Rochester is a Tier 1 local exchange carrier,[3] subject to price cap regulation since July 1, 1991. Ontonagon and Midway are two of Rochester's local exchange carrier subsidiaries. Ontonagon, which serves approximately 4,000 access lines, is wholly owned by Rochester. Midway, which serves approximately 900 access lines, is 99.65 percent owned by Ontonagon. Both Ontonagon and Midway were in the NECA traffic sensitive and common line pools prior to their acquisition by Rochester on April 10, 1989.[4] When Rochester elected price cap regulation, pursuant to Section 61.41 of the Commission's rules, its subsidiaries were included under price cap regulation as well.[5] On September 19, 1994, Rochester and Mid-South (a Tier 2 company) entered into an agreement whereby Mid-South would acquire all of the outstanding shares of Ontonagon from Rochester, and would then operate Ontonagon, Midway and S & A Telephone Company, Inc. (S & A).[6]

3. The Commission's rules provide that when a rate of return company and a price cap company merge, or when one company acquires the other, the resulting company must comply with price cap regulation within a year of the transaction.[7] In the absence of this "all-or-nothing" rule, a local exchange carrier might attempt to shift costs from its price cap affiliate to its rate of return affiliate, allowing the rate of return affiliate to retain higher rates, and thus generate greater earnings for the price cap affiliate without triggering the sharing mechanism. Also, a local exchange carrier could "game the system" by opting out of price cap regulation, increasing its costs inefficiently under rate of return regulation, then opting for price caps again and reducing its costs to an efficient level.[8] The carrier would realize higher earnings as a result of its cost reductions. The carrier would thus be rewarded for efficiency gains without reducing the rates.[9] The Commission has stated, however, that "in some cases, the efficiencies created by the purchase and sale of one or two exchanges may outweigh the threat of gaming the system. Such cases might justify [a] narrow waiver of the all- or-nothing rule."[10]

4. Petitioners contend that the grant of the waiver is in the public interest because Mid-South would be under an administrative and financial burden if it had to operate three small local exchange carriers, serving approximately 6,000 access lines, subject to price caps.[11] Mid-South contends that the granting of waivers will allow it to be more efficient in managing its business and providing customer service.[12] Petitioners also contend that granting the waiver would be consistent with prior waivers granted by this Bureau, the Commission's price cap policies, and its regulation of small telephone companies.[13]

5. On December 14, 1994, NECA filed comments in support of the joint petition for waivers. NECA argues that in this case there would be no cost shifting between affiliates, and that the Commission has consistently granted similar waiver requests for other small exchange carriers.[14]

6. We conclude that there is good cause to grant Petitioners waivers of Sections 61.41(c) and (d) of the Commission's rules to permit Mid-South to avoid price cap regulation after acquiring ownership of Ontonagon and

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[1] 47 C.F.R. §§ 61.41(c), 61.41(d), 69.3(e)(11) and 69.3(i)(4).
[2] Joint Petition at 1.
[3] Tier 1 local exchange carriers are companies having annual revenues from regulated telecommunications operations of $100 million or more for a sustained period of time. Commission Requirements for Cost Support Material to be Filed with 1990 Annual Access Tariffs, Order, 5 FCC Rcd 1364 (1990).
[4] *Id.*
[5] 47 C.F.R. § 61.41.
[6] *Id.* at 2-3. Mid-South previously acquired S & A from Rochester, and, pursuant to Commission waiver, was permitted to re-enter the NECA pool.
[7] Section 61.41(c)(2) of the Commission's rules, 47 C.F.R. § 61.41(c)(2).
[8] *Id.*
[9] Policy and Rules Concerning Rates for Dominant Carriers, Order on Reconsideration, 6 FCC Rcd 2637, 2706 (1991).
[10] *Id.*
[11] *Id.*at 4-5.
[12] *Id.* at 4.
[13] *Id.* at 6-7.
[14] NECA Comments at 5.

Midway. The first concern identified by the Commission in adopting these rules, cost shifting between affiliates, is not at issue here. Neither Rochester nor Mid-South are seeking to maintain Ontonagon and Midway as affiliates under different systems of regulation. The second concern underlying the rule, "gaming the system," also is not raised in this case. Rochester will remain regulated under price caps and retain no ownership interest in Ontonagon or Midway. Additionally, Mid-South has stated that it will not elect price caps and will be under rate of return regulation.[15] Moreover, Rochester has agreed to reduce its interstate revenues to reflect the sale of the two exchanges to Mid-South, and adjust its price cap indices accordingly.[16] Grant of the waiver is conditioned on Rochester's compliance with this representation.

7. Further, the Commission has always been sensitive to the administrative burdens imposed on small and mid-size local exchange carriers by the application of Commission rules.[17] In the *LEC Price Cap Order*,[18] the Commission recognized that small telephone companies should not be forced into a regulatory regime that was designed largely on the basis of the historical performance by the largest local exchange carriers. The Commission, therefore, made price cap regulation optional for smaller carriers. Given the Commission's reservations about mandatory application of the price cap plan to carriers other than GTE and the Regional Bell Operating Companies, our application of the all-or-nothing rule must take into account the Commission's concerns about applying the price cap system to small carriers.

8. For the foregoing reasons, we grant a waiver of the all-or-nothing rule for Mid-South, subject to Rochester's fuifillment of its commitment to adjust its price cap indices as described above. Our waiver of Sections 61.41(c) and (d) allows Mid-South, with the acquisition of Ontonagon and Midway, to be the subject of rate of return regulation. Because Mid-South does not serve more than 50,000 access lines, it does not require a waiver of Section 69.3 to re-enter the NECA pools.[19]

9. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 4(i), and Sections 0.91 and 0.291 of the Commission's Rules, 47 C.F.R. §§ 0.91, 0.291, that the joint petition of Rochester Telephone Corporation, Mid-South Telecommunications Company, Inc., Ontonagon County Telephone Company and Midway Telephone Company for waivers of Sections 61.41(c) and (d) of the Commission's Rules, 47 C.F.R. §§ 61.41(c) and (d), IS GRANTED, subject to the condition in paragraph six of this Order.

10. IT IS FURTHER ORDERED that the joint petition of Rochester Telephone Corporation, Mid-South Telecommunications Company, Inc., Ontonagon County Telephone Company and Midway Telephone Company for waivers of Sections 69.3 (e)(11) and 69.3(i)(4) of the Commission's Rules, 47 C.F.R. §§ 69.3(e)(11) and (i)(4), IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen M.H. Wallman
Chief, Common Carrier Bureau

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[15] Joint Petition at 7.

[16] Letter of Michael J. Shortley, III, Rochester Telephone Corp., to David Nall, Deputy Chief, Tariff Division, Common Carrier Bureau (Feb. 2, 1995.)

[17] *See, e.g.*, Regulatory Reform for Local Exchange Carriers Subject to Rate of Return Regulation, Report and Order, 8 FCC Rcd 4545 (1993), *petitions for recon. pending;* and Regulation of Small Telephone Companies, Notice of Proposed Rulemaking, 2 FCC Rcd 1010 (1986); Report and Order, 2 FCC Rcd 3811 (1987); Order on Reconsideration, 3 FCC Rcd 5770 (1988).

[18] Policy and Rules Concerning Rates for Dominant Carriers, Second Report and Order, 5 FCC Rcd 6786 (1990) (*LEC Price Cap Order);* Erratum, 5 FCC Rcd 7664 (1990), *modified on recon.*, 6 FCC Rcd 2637 (1991) (*LEC Price Cap Reconsideration Order), petitions for further recon. dismissed*, 6 FCC Rcd 7482 (1991), *further modified on recon.*, 6 FCC Rcd 4524 (1991) (*ONA/Part 69 Order), petitions for review of LEC Price Cap Order dismissed*, National Rural Telecom Association v. FCC, 988 F.2d 174 (D.C. Cir. 1993).

[19] 47 C.F.R. § 69.3(g)(2).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

HI-RIM COMMUNICATIIONS, INC. File No. I-T-C-95-094

Application for authority
to acquire and operate
facilities for provision
of communications services between
the United States and various
overseas points.

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: March 17, 1995; Released: March 27, 1995

By the Chief, Telecommunications Division:

1. Upon consideration of the above-captioned uncontested application, filed pursuant to Section 214 of the Communications Act of 1934, as amended, IT IS HEREBY CERTIFIED, that the present and future public convenience and necessity require a grant thereof.

2. Accordingly, IT IS ORDERED, that application File No. I-T-C-95-094 IS GRANTED, and Hi-Rim Communications, Inc. (Hi-Rim) is authorized to:

a. establish channels of communication between appropriately licensed U.S. earth stations and INTELSAT satellites, for provision of Intelsat Business Services (IBS), International Television Service and Datanet Service between the United States and the international points listed in Comsat's tariffs for the space segment of these services;

b. lease from Comsat and operate the satellite circuits specified in Appendix A, between appropriately licensed U.S. earth stations and INTELSAT Atlantic and Pacific Ocean Region satellites, connecting with similar facilities between the satellites and the overseas points listed in Appendix A, furnished by its correspondents;

c. lease from PanAmerican Satellite Corp. (PAS) and operate the satellite circuits specified in Appendix B, between appropriately licensed U.S. earth stations and the PAS-1, PAS-2 and PAS-4 satellites, connecting with similar circuits between the satellites and the overseas points listed in Appendix B, furnished by its correspondents;

d. lease from the Columbia/TDRSS International Satellite System (TDRSS) and operate the satellite circuits specified in Appendix B, between appropriately licensed U.S. earth stations and the TDRS-41 and TDRS-174 satellites, connecting with similar circuits between the satellites and the overseas points listed in Appendix B, furnished by its correspondents;

e. lease from Orion Satellite Corporation (Orion) and operate the satellite circuits specified in Appendix B, between appropriately licensed U.S. earth stations and the Orion F1 satellite, connecting with similar circuits between the satellite and the overseas points listed in Appendix B, furnished by its correspondents;

f. establish channels of communications between appropriately licensed U.S. earth stations and U.S. domestic satellites (also Anik satellites for service to Canada, and Mexican domestic satellites for service to Mexico), for provision of authorized transborder services between the United States and the points listed in Appendix C;

g. lease and operate necessary connecting facilities in the United States;

h. lease a one-half interest in and operate any necessary overseas connecting facilities; and

i. use the facilities authorized in b, c. d, and e, above to provide Hi-Rim's regularly authorized services, including switched voice and data, and private line services, between the United States and the points specified in Appendices A and B.

3. IT IS FURTHER ORDERED that neither Hi-Rim nor any persons or companies directly or indirectly controlling or controlled by Hi-Rim, or under direct or indirect common control with it, shall acquire or enjoy any right, for the purposes of handling or interchanging traffic to or from the United States, its territories or possessions, which is denied to any other United States carrier by reason of any concession, contract, understanding, or working arrangement to which Hi-Rim or any persons or companies controlling or controlled by Hi-Rim are parties.

4. IT IS FURTHER ORDERED that our authorization of Hi-Rim to provide private lines as part of its authorized services is limited to the provision of such private lines only between the United States and the countries listed in the Appendices -- that is, private lines which originate in the United States and terminate in one of the countries listed in the Appendices or which originate in one of the countries listed in the Appendices and terminate in the United States. In addition, Hi-Rim may not -- and Hi-Rim's tariff must state that its customers may not -- connect private lines provided over these facilities to the public switched network at either the U.S. or foreign end, or both, for the provision of international basic switched services, unless authorized to do so by the Commission upon a finding that the destination country affords resale opportunities equivalent to those available under U.S. law, in accordance with *Regulation of International Accounting Rates, Phase II, First Report and Order*, 7 FCC Rcd 559 (1991), Order on Reconsideration and Third Further Notice of Proposed Rulemaking, 7 FCC Rcd 7927 (1994), *petition for reconsideration pending.*

5. IT IS FURTHER ORDERED that the applicant shall file copies of any operating agreements entered into with its foreign correspondents with the Commission within 30 days of their execution, and shall otherwise comply with the filing requirements contained in Section 43.51 of the Commission's Rules, 47 C.F.R. §43.51.

6. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. §203 and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this Order.

7. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61.

8. IT IS FURTHER ORDERED that the applicant shall file a separate Section 214 application for any additional circuits it seeks to operate via the PAS-1, PAS-4, TDRS-41 or TDRS-174 satellites

9. IT IS FURTHER ORDERED that the number of circuits authorized herein for the provision of services via separate satellite systems is subject to limitations on the number of circuits specified under the separate systems policy and applicable consultations under Article XIV(d) of the INTELSAT Agreement.

10. This Order is issued under Section 0.261 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this Order (see Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

Diane J. Cornell
Chief, Telecommunications Division
International Bureau

APPENDIX A

COUNTRIES TO BE SERVED VIA INTELSAT
NUMBERS INDICATE 64-KBPS VOICE-GRADE CIRCUITS

Country	Circuits	Country	Circuits	Country	Circuits
Argentina	50	Guinea	50	Poland	50
Australia	50	Haiti	50	Portugal	50
Austria	50	Honduras	50	Romania	50
Bahamas	50	India	50	Saudi Arabia	50
Barbados	50	Indonesia	50	Senegal	50
Belgium	50	Iran	50	Serbia and Montenegro	50
Bolivia	50	Ireland	50	Singapore	50
Brazil	50	Israel	50	Somalia	50
Canada	50	Italy	50	South Africa	50
Czech Republic	50	Jamaica	50	Spain	50
Chile	50	Japan	50	Sweden	50
China, People's Republic	50	Jordan	50	Switzerland	50
Croatia	50	Kenya	50	Syria	50
Denmark	50	Korea, Republic of	50	Taiwan	50
Dominican Republic	50	Kuwait	50	Thailand	50
Ecuador	50	Lebanon	50	Trinidad & Tobago	50
Egypt	50	Liechten-stein	50	Uganda	50
El Salvador	50	Luxembourg	50	United Arab Emirates	50
Ethiopia	50	Malaysia	50	United Kingdom	50
Finland	50	Mexico	50	Uruguay	50
France	50	Morocco	50	Vietnam	50
Guantanomo Bay	50	Netherlands	50	Venezuela	50
Germany, Federal Republic of	50	Netherlands Antilles	50	Zaire	50
Ghana	50	New Zealand	50		
Greece	50	Nicaragua	50		
Guatemala	50	Norway	50		
		Panama	50		
		Peru	50		
		Philippines	50		

APPENDIX B

COUNTRIES TO BE SERVED VIA PAS-1 (NOT INTERCONNECTED)

Up to ten 64-Kbps voice-grade circuits between the United States and each of the following countries:

Ku-band Countries

Anguilla
Austria
Azerbaijan
Bahamas
Belgium
Bermuda
Bosnia-Herzogovenia
British Virgin Is.
Cayman Islands
Czech Republic
Denmark
France
Germany
Greece
Ireland
Italy
Luxembourg
Monaco
Montserrat
Netherlands
Portugal
Romania
Russian Fed.
Serbia and Montenegro
Spain
Sweden
Switzerland
T.F.Y.R. of Macedonia
Turks & Caicos Is.
United Kingdom

APPENDIX B (Cont'd)

C-band Countries:

Anguilla
Argentina
Aruba
Bahamas
Barbados
Bermuda
Bolivia
Brazil
British Virgin Is.
Cayman Islands
Chile
Colombia
Costa Rica
Dominican Rep.
Ecuador
Guatemala
Haiti
Honduras
Jamaica
Mexico
Montserrat
Netherlands Antilles
Panama
Paraguay
Peru
Trinidad and Tobago
Turks & Caicos Is.
Uruguay
Venezuela

COUNTRIES TO BE SERVED VIA PAS-1 (INTERCONNECTED)

Up to six 64-Kbps voice grade circuits between the United States and each of the following countries:

Ku-band Countries:

Azerbaijan
Bahamas
Bosnia-Herzogovenia
Czech Republic
Portugal
Romania
Russian Fed.
Serbia and Montenegro
T.F.Y.R. of Macedonia
United Kingdom

C-Band Countries:

Bahamas
Costa Rica
Dominican Republic
Netherlands Antilles
Panama
Peru

APPENDIX B (Cont'd)

COUNTRIES TO BE SERVED VIA PAS-2 (NON-INTERCONNECTED)

Up to ten 64-Kbps voice-grade circuits between the United States and each of the following countries:

United Kingdom

COUNTRIES TO BE SERVED VIA PAS-2 (INTERCONNECTED)

Up to six 64-Kbps voice-grade circuits between the United States and each of the following countries:

United Kingdom

COUNTRIES TO BE SERVED VIA PAS-4 (NON-INTERCONNECTED)

Up to ten 64-Kbps voice-grade circuits between the United States and each of the following countries:

Australia
Hong Kong
New Zealand

COUNTRIES TO BE SERVED VIA PAS-4 (INTERCONNECTED)

Up to six 64-Kbps voice-grade circuits between the United States and each of the following countries:

Australia
Hong Kong
New Zealand

APPENDIX B (Cont'd)

COUNTRIES TO BE SERVED VIA COLUMBIA'S TDRSS (NON-INTERCONNECTED)

Up to ten 64-Kbps voice-grade circuits between the United States and each of the following countries:

TDRS-41	TDRS-174
Austria	Hong Kong
Bahamas	Japan
Belgium	Mexico
Bosnia-Herzogovenia	Philippines
Canada	Republic of Korea
Denmark	
Finland	
France	
Germany	
Ireland	
Israel	
Jamaica	
Liechtenstein	
Luxembourg	
Mexico	
Netherlands	
Portugal	
Serbia and Montenegro	
Sweden	
Switzerland	
T.F.Y.R. of Macedonia	
Turkey	
United Kingdom	

APPENDIX B (Cont'd)

COUNTRIES TO BE SERVED VIA TDRSS (INTERCONNECTED)

Up to six 64-Kbps voice-grade circuits between the United States and each of the following countries:

TDRS-41	TDRS-174
Germany	Hong Kong
Bosnia-Herzogovenia	
Serbia and Montenegro	
T.F.Y.R. of Macedonia	
United Kingdom	

COUNTRIES TO BE SERVED VIA ORION F1 (INTERCONNECTED)

Up to six 64-Kbps voice-grade circuits between the United States and each of the following countries:

Germany
Ireland
The Netherlands
Poland
Sweden

COUNTRIES TO BE SERVED VIA ORION F1 (NON-INTERCONNECTED)

Up to ten 64-Kbps voice-grade circuits between the United States and each of the following countries:

Austria	Norway
Belgium	Poland
Denmark	Serbia and Montenegro
France	Sweden
Germany	T.F.Y.R. of Macedonia
Ireland	The Netherlands
Italy	United Kingdom
Luxembourg	

APPENDIX C

COUNTRIES TO BE SERVED VIA AUTHORIZED U.S. DOMESTIC SATELLITES, MEXICAN MORELOS (AND SOLIDARIDAD) SATELLITES, AND ANIK SATELLITES

Anguilla	Domestic Satellites
Antigua and Barbuda	Domestic Satellites
Bahamas	Domestic Satellites
Barbados	Domestic Satellites
Belize	Domestic Satellites
Bermuda	Domestic Satellites
British Virgin Islands	Domestic Satellites
Canada	Domestic Satellites, ANIK
Cayman Islands	Domestic Satellites
Dominica	Domestic Satellites
Grenada	Domestic Satellites
Grenadines	Domestic Satellites
Mexico	DomSats, Morelos and Solidaridad
Montserrat	Domestic Satellites
Netherlands Antilles	Domestic Satellites
St. Kitts & Nevis	Domestic Satellites
St. Lucia	Domestic Satellites
St. Vincent	Domestic Satellites
Turks & Caicos	Domestic Satellites
Venezuela	Domestic Satellites

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TELEDATA INTERNATIONAL, INC. File No. I-T-C-95-096

Application for authority to acquire and operate facilities for provision of communications services between the United States and various overseas points.

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: March 17, 1995; Released: March 27, 1995

By the Chief, Telecommunications Division:

1. Upon consideration of the above-captioned uncontested application, filed pursuant to Section 214 of the Communications Act of 1934, as amended, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require a grant thereof.

2. Accordingly, IT IS ORDERED that application File No. I-T-C-95-096 IS GRANTED, and Teledata International, Inc. (TDI) is authorized to:

a. establish channels of communication between appropriately licensed U.S. earth stations and INTELSAT satellites, for provision of Intelsat Business Services (IBS), International Television Service and Datanet Service between the United States and the international points listed in Comsat's tariffs for the space segment of these services;

b. lease from Comsat and operate the satellite circuits specified in Appendix A, between appropriately licensed U.S. earth stations and INTELSAT Atlantic and Pacific Ocean Region satellites, connecting with similar facilities between the satellites and the overseas points listed in Appendix A, furnished by its correspondents;

c. lease from PanAmerican Satellite Corp. (PAS) and operate the satellite circuits specified in Appendix B, between appropriately licensed U.S. earth stations and the PAS-1, PAS-2 and PAS-4 satellites, connecting with similar circuits between the satellites and the overseas points listed in Appendix B, furnished by its correspondents;

d. lease from the Columbia/TDRSS International Satellite System (TDRSS) and operate the satellite circuits specified in Appendix B, between appropriately licensed U.S. earth stations and the TDRS-41 and TDRS-174 satellites, connecting with similar circuits between the satellites and the overseas points listed in Appendix B, furnished by its correspondents;

e. lease from Orion Satellite Corporation (Orion) and operate the satellite circuits specified in Appendix B, between appropriately licensed U.S. earth stations and the Orion F1 satellite, connecting with similar circuits between the satellite and the overseas points listed in Appendix B, furnished by its correspondents;

f. establish channels of communications between appropriately licensed U.S. earth stations and U.S. domestic satellites (also Anik satellites for service to Canada, and Mexican domestic satellites for service to Mexico), for provision of authorized transborder services between the United States and the points listed in Appendix C;

g. lease and operate necessary connecting facilities in the United States;

h. lease a one-half interest in and operate any necessary overseas connecting facilities; and

i. use the facilities authorized in b, c, d, and e, above to provide TDI's regularly authorized services, including switched voice and data, and private line services, between the United States and the points specified in Appendices A and B.

3. IT IS FURTHER ORDERED that neither TDI nor any persons or companies directly or indirectly controlling or controlled by TDI, or under direct or indirect common control with it, shall acquire or enjoy any right, for the purposes of handling or interchanging traffic to or from the United States, its territories or possessions, which is denied to any other United States carrier by reason of any concession, contract, understanding, or working arrangement to which TDI or any persons or companies controlling or controlled by TDI are parties.

4. IT IS FURTHER ORDERED that our authorization of TDI to provide private lines as part of its authorized services is limited to the provision of such private lines only between the United States and the countries listed in the Appendices -- that is, private lines which originate in the United States and terminate in one of the countries listed in the Appendices or which originate in one of the countries listed in the Appendices and terminate in the United States. In addition, TDI may not -- and TDI's tariff must state that its customers may not -- connect private lines provided over these facilities to the public switched network at either the U.S. or foreign end, or both, for the provision of international basic telecommunications services, including switched voice services, unless authorized to do so by the Commission upon a finding that the destination country affords resale opportunities equivalent to those available under U.S. law, in accordance with *Regulation of International Accounting Rates, Phase II, First Report and Order*, 7 FCC Rcd 559 (1991), Order on Reconsideration and Third Further Notice of Proposed Rulemaking, 7 FCC Rcd 7927 (1994), *petition for reconsideration pending.*

5. IT IS FURTHER ORDERED that the applicant shall file copies of any operating agreements entered into with its foreign correspondents with the Commission within 30 days of their execution, and shall otherwise comply with the filing requirements contained in Section 43.51 of the Commission's Rules, 47 C.F.R. §43.51.

6. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. §203 and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this Order.

7. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61.

8. IT IS FURTHER ORDERED that the applicant shall file a separate Section 214 application for any additional circuits it seeks to operate via the PAS-1, PAS-4, TDRS-41 or TDRS-174 satellites.

9. IT IS FURTHER ORDERED that the number of circuits authorized herein for the provision of services via separate satellite systems is subject to limitations on the number of circuits specified under the separate systems policy and applicable consultations under Article XIV(d) of the INTELSAT Agreement.

10. This Order is issued under Section 0.261 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this Order (see Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

Diane J. Cornell
Chief, Telecommunications Division
International Bureau

APPENDIX A

COUNTRIES TO BE SERVED VIA INTELSAT
NUMBERS INDICATE 64-KBPS VOICE-GRADE CIRCUITS

Country	Circuits	Country	Circuits	Country	Circuits
Argentina	50	Guinea	50	Poland	50
Australia	50	Haiti	50	Portugal	50
Austria	50	Honduras	50	Romania	50
Bahamas	50	India	50	Saudi Arabia	50
Barbados	50	Indonesia	50	Senegal	50
Belgium	50	Iran	50	Serbia and Montenegro	50
Bolivia	50	Ireland	50	Singapore	50
Brazil	50	Israel	50	Somalia	50
Canada	50	Italy	50	South Africa	50
Czech Republic	50	Jamaica	50	Spain	50
Chile	50	Japan	50	Sweden	50
China, People's Republic	50	Jordan	50	Switzerland	50
Croatia	50	Kenya	50	Syria	50
Denmark	50	Korea, Republic of	50	Taiwan	50
Dominican Republic	50	Kuwait	50	Thailand	50
Ecuador	50	Lebanon	50	Trinidad & Tobago	50
Egypt	50	Liechtenstein	50	Uganda	50
El Salvador	50	Luxembourg	50	United Arab Emirates	50
Ethiopia	50	Malaysia	50	United Kingdom	50
Finland	50	Mexico	50	Uruguay	50
France	50	Morocco	50	Vietnam	50
Guantanomo Bay	50	Netherlands	50	Venezuela	50
Germany, Federal Republic of	50	Netherlands Antilles	50	Zaire	50
Ghana	50	New Zealand	50		
Greece	50	Nicaragua	50		
Guatemala	50	Norway	50		
		Panama	50		
		Peru	50		
		Philippines	50		

APPENDIX B

COUNTRIES TO BE SERVED VIA PAS-1
(NOT INTERCONNECTED)

Up to ten 64-Kbps voice-grade circuits between the United States and each of the following countries (except up to 42 non-interconnected circuits between the United States and Bosnia-Herzegovenia and Serbia-Montenegro):

Ku-band Countries

Anguilla
Austria
Azerbaijan
Bahamas
Belgium
Bermuda
Bosnia-Herzegovenia
British Virgin Is.
Cayman Islands
Czech Republic
Denmark
France
Germany
Greece
Ireland
Italy
Luxembourg
Monaco
Montserrat
Netherlands
Portugal
Romania
Russian Fed.
Serbia and Montenegro
Spain
Sweden
Switzerland
T.F.Y.R. of Macedonia
Turks & Caicos Is.
United Kingdom

APPENDIX B (Cont'd)

C-band Countries:

Anguilla
Argentina
Aruba
Bahamas
Barbados
Bermuda
Bolivia
Brazil
British Virgin Is.
Cayman Islands
Chile
Colombia
Costa Rica
Dominican Rep.
Ecuador
Guatemala
Haiti
Honduras
Jamaica
Mexico
Montserrat
Netherlands Antilles
Panama
Paraguay
Peru
Trinidad and Tobago
Turks & Caicos Is.
Uruguay
Venezuela

COUNTRIES TO BE SERVED VIA PAS-1 (INTERCONNECTED)

Up to six 64-Kbps voice grade circuits between the United States and each of the following countries (except up to 42 interconnected circuits between the United States and Bosnia-Herzegovenia and Serbia-Montenegro):

Ku-band Countries:

Azerbaijan
Bahamas
Bosnia-Herzegovenia
Czech Republic
Portugal
Romania
Russian Fed.
Serbia-Montenegro
Somalia
T.F.Y.R. of Macedonia
United Kingdom

C-Band Countries:

Bahamas
Costa Rica
Dominican Republic
Netherlands Antilles
Panama
Peru

APPENDIX B (Cont'd)

COUNTRIES TO BE SERVED VIA PAS-2 (NON-INTERCONNECTED)

Up to ten 64-Kbps voice-grade circuits between the United States and each of the following countries:

United Kingdom

COUNTRIES TO BE SERVED VIA PAS-2 (INTERCONNECTED)

Up to six 64-Kbps voice-grade circuits between the United States and each of the following countries:

United Kingdom

COUNTRIES TO BE SERVED VIA PAS-4 (NON-INTERCONNECTED)

Up to ten 64-Kbps voice-grade circuits between the United States and each of the following countries:

Australia
Hong Kong
New Zealand

COUNTRIES TO BE SERVED VIA PAS-4 (INTERCONNECTED)

Up to six 64-Kbps voice-grade circuits between the United States and each of the following countries:

Australia
Hong Kong
New Zealand

APPENDIX B (Cont'd)

COUNTRIES TO BE SERVED VIA COLUMBIA'S TDRSS (NON-INTERCONNECTED)

Up to ten 64-Kbps voice-grade circuits between the United States and each of the following countries (except up to 42 non-interconnected circuits between the United States and Bosnia-Herzegovenia and Serbia-Montenegro):

TDRS-41	TDRS-174
Austria	Hong Kong
Bahamas	Japan
Belgium	Mexico
Bosnia-Herzegovenia	Philippines
Canada	Republic of Korea
Denmark	
Finland	
France	
Germany	
Ireland	
Israel	
Jamaica	
Liechtenstein	
Luxembourg	
Mexico	
Netherlands	
Portugal	
Serbia-Montenegro	
Sweden	
Switzerland	
T.F.Y.R. of Macedonia	
Turkey	
United Kingdom	

COUNTRIES TO BE SERVED VIA TDRSS (INTERCONNECTED)

Up to six 64-Kbps voice-grade circuits between the United States and each of the following countries (except up to 42 interconnected circuits between the United States and Bosnia-Herzegovenia and Serbia-Montenegro):

TDRS-41	TDRS-174
Germany	Hong Kong
Bosnia-Herzegovenia	
Serbia-ontenegro	
T.F.Y.R. of Macedonia	
United Kingdom	

APPENDIX C

COUNTRIES TO BE SERVED VIA AUTHORIZED U.S. DOMESTIC SATELLITES, MEXICAN MORELOS (AND SOLIDARIDAD) SATELLITES, AND ANIK SATELLITES

Anguilla	Domestic Satellites
Antigua and Barbuda	Domestic Satellites
Bahamas	Domestic Satellites
Barbados	Domestic Satellites
Belize	Domestic Satellites
Bermuda	Domestic Satellites
British Virgin Islands	Domestic Satellites
Canada	Domestic Satellites, ANIK
Cayman Islands	Domestic Satellites
Dominica	Domestic Satellites
Grenada	Domestic Satellites
Grenadines	Domestic Satellites
Mexico	DomSats, Morelos and Solidaridad
Montserrat	Domestic Satellites
Netherlands Antilles	Domestic Satellites
St. Kitts & Nevis	Domestic Satellites
St. Lucia	Domestic Satellites
St. Vincent	Domestic Satellites
Turks & Caicos	Domestic Satellites
Venezuela	Domestic Satellites

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AT&T CORP. File No. I-T-C-94-412

Application for authority to
acquire and operate capacity
in extension facilities for
the PacRimEast, PacRimWest,
and TASMAN 2 Cable Systems.

ORDER AND AUTHORIZATION

Adopted: March 20, 1995; Released: March 27, 1995

By the Chief, Telecommunications Division:

1. Upon consideration of the above-captioned uncontested application, filed pursuant to Section 214 of the Communications Act of 1934, as amended, we find that the present and future public convenience and necessity require a grant thereof.

2. Accordingly, IT IS ORDERED that application File No. I-T-C-94-412 IS GRANTED, and AT&T Corp. is authorized to acquire by lease or other comparable means, including on an Indefeasible Right of User basis, and operate any overseas connecting facilities necessary for use of authorized facilities in the PacRimEast, PacRimWest and TASMAN 2 Cable Systems.

3. This Order is issued under Section 0.261 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this Order (see Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

Diane J. Cornell
Chief, Telecommunications Division
International Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

MCI TELECOMMUNICATIONS CORP. File No. I-T-C-95-030

Application for authority to acquire and operate facilities for service between the United States and various overseas points.

ORDER AND AUTHORIZATION

Adopted: March 20, 1995; Released: March 28, 1995

By the Chief, Telecommunications Division:

1. Upon consideration of the above-captioned uncontested application, filed pursuant to Section 214 of the Communications Act of 1934, as amended, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision of direct service between the United States and the points listed in the Appendices.

2. Accordingly, IT IS ORDERED that application File No. I-T-C-95-030 IS GRANTED and MCI is authorized to:

a. lease from Comsat and operate 23 voice-grade satellite circuits between MCI's authorized U.S. international earth stations and appropriate INTELSAT satellites over the Atlantic and Pacific Oceans, connecting with similar circuits between the satellite and earth stations in the countries listed in Appendix A, furnished by MCI's correspondents;

b. own and operate facilities in the U.S. earth stations to be used in conjunction with the satellite space segment capacity;

c. acquire on an Indefeasible Right of User basis a one-half interest in and operate the cable facilities listed in Appendix B;

d. own and operate necessary domestic connecting facilities;

e. lease a one-half interest in and operate any necessary overseas connecting facilities; and

f. use the facilities in a, b, c, d, and e, above to provide MCI's regularly authorized services between the United States, on the one hand, and the countries listed in Appendix A and B, on the other hand.

3. IT IS FURTHER ORDERED that our authorization of MCI to provide private lines as part of its authorized services is limited to the provision of such private lines only between the United States and one of the points listed in the Appendices -- that is, private lines which originate in the United States and terminate in one of the points listed in the Appendices or which originate in one of the points listed in the Appendices and terminate in the United States. In addition, MCI may not -- and MCI's tariff must state that its customers may not -- connect private lines provided over these facilities to the public switched network at either the U.S. or the foreign end, or both, for the provision of international basic switched services, unless authorized to do so by the Commission upon a finding that the destination country affords resale opportunities equivalent to those available under U.S. law, in accordance with *Regulation of International Accounting Rates, Phase II, First Report and Order*, 7 FCC Rcd 559 (1991), Order on Reconsideration and Third Further Notice of Proposed Rulemaking, 7 FCC Rcd 7927 (1992), *petition for reconsideration pending.*

4. IT IS FURTHER ORDERED that neither MCI nor any persons or companies directly or indirectly controlling or controlled by MCI, or under direct or indirect common control with it, shall acquire or enjoy any right, for the purposes of handling or interchanging traffic to or from the United States, its territories or possessions, which is denied to any other United States carrier by reason of any concession, contract, understanding, or working arrangement to which MCI or any persons or companies controlling or controlled by MCI are parties.

5. IT IS FURTHER ORDERED that the applicant shall file copies of any operating agreements it enters into with its foreign correspondents with the Commission within 30 days of their execution, and shall otherwise comply with the filing requirements contained in Section 43.51 of the Commission's Rules, 47 C.F.R. §43.51.

6. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. §203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this Order.

7. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61.

8. IT IS FURTHER ORDERED that the applicant shall file semi-annual circuit reports pursuant to Section 63.15(b) of the Commission's Rules, 47 C.F.R. §63.15(b), for the common carrier facilities authorized herein.

9. The Commission retains jurisdiction over this matter to reallocate circuits in the satellite system among the various international common carriers and other authorized users as required to ensure nondiscriminatory use of, and equitable access to, the communications satellite system.

10. This order is issued under Section 0.261 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

Chief, Diane J. Cornell
Telecommunications Division
International Bureau

APPENDIX A

COUNTRIES TO BE SERVED VIA INTELSAT

COUNTRY	NUMBER OF 64-KBPS CIRCUITS
AFGHANISTAN	5
ALBANIA	15
ANTARCTICA	5
ARMENIA	30
ASCENSION ISLANDS	5
AZERBAIJAN	10
BHUTAN	5
BOSNIA-HERZEGOVENIA	10
BURUNDI	10
CENTRAL AFRICAN	10
CHAD	10
CHRISTMAS IS	5
COCOS IS	5
COMOROS	5
COOK ISLAND	5
CUBA (GUANTANAMO)	480
MAURITIUS1	10
DIEGO GARCIA	10
DJIB0UTI	10
EQUATORIAL GUINEA	5
ERITREA	15
FAEROE ISLANDS	5
FALKLAND IS	5
FRENCH ANTILLES	20
FRENCH GUIANA	10
FRENCH POLY	30
GEORGIA	15
GIBRALTAR	10
GREENLAND	10
GUADELOUPE	20
GUINEA-BISSAU	10
KYRGYZSTAN	10
KIRIBATI	5
SERBIA AND MONTENE-GRO	10
LAOS	10
LESOTHO	10
LIBYA	15
LITHUANIA	30
TFYR OF MACEDONIA	32
MADAGASCAR	10
MALDIVES	5
MAYOTTE	5
MICRONESIA	24
MIDWAY	10
MOLDOVA	10
MONACO	30
MONGOLIA	5
MOZAMBIQUE	10
MYANMAR	12
NAMIBIA	10
NAURU	5
NEW CALEDONIA	10
NIUE IS	5
NORFOLK IS	10
PITCAIRN IS	5
REUNION	5
SAN MARINO	10
SAO TOME	30
SEYCHELLES	5
SOLOMON ISLAND	5
SOMALIA	5
ST. HELENA	5
ST PIERRE & MIQUEL	5
SUDAN	10
TADJIKISTAN	10
TURKMENISTAN	10
TUVALU	5
UZBEKISTAN	10
VANUATU	5
VATICAN CITY	10
WAKE ISLAND	5
WALLIS & FUTUNA IS.	5
WESTERN SAHARA	5
WESTERN SAMOA	10
SERBIA AND MONTENIEGRO	60
ZAIRE	10

APPENDIX B

COUNTRIES TO BE SERVED VIA CABLE

COUNTRY	NUMBER OF 64-KBPS CIRCUITS	FACILITIES
BELARUS	20	TAT-10 Denmark-Germany-1 Denmark-Russia-1
CROATIA	90	TAT-11
ESTONIA	30	TAT-11 IOR SATELLITE
KAZAKHSTAN	30	TAT-11 IOR SATELLITE
LATVIA	30	TAT-10 Denmark-Germany-1 Denmark-Poland-1
	30	NEPAL TAT-11 IOR SATELLITE
PALAU	10	HAW-4/TPC-3 SATELLITE
SLOVAKIA	60	TAT-10

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

BellSouth Telecommunications, Inc.

Petition for Waiver of
Section 69.4(b) of the
Commission's Rules

MEMORANDUM OPINION AND ORDER

Adopted: March 6, 1995; Released: March 27, 1995

By the Acting Chief, Tariff Division, Common Carrier Bureau:

1. On August 26, 1994, BellSouth Telecommunications, Inc. (BellSouth) filed a petition for waiver of Part 69 of the Commission's Rules, 47 C.F.R. Part 69, to establish new rate elements to recover the costs of operator-assistance services that it plans to offer interexchange carriers (IXCs). In particular, BellSouth seeks a waiver of Section 69.4(b) of the rules, 47 C.F.R. § 69.4(b), which provides that local exchange carrier (LEC) charges for access services shall include certain specified rate elements. BellSouth proposes to establish four additional rate elements for a group of new operator-assistance services to be known as "Operator Plus."[1] These new services would provide IXCs with live and automated operator assistance for such tasks as dialing instructions, carrier rate information, calling card validation and billing number screening services. BellSouth Petition at 2. BellSouth states that its waiver petition is similar to the petitions filed earlier by Southwestern Bell and Bell Atlantic, and is supported by similar public interest considerations. In this regard, BellSouth reports that six IXCs have expressed an interest in purchasing Operator Plus service as soon as it is available. *Id.* at 3. Thus, BellSouth asserts, its service offering will provide IXCs with additional call handling capabilities, which will in turn stimulate further competition in the telecommunictions market. *Id.*

2. On October 12, 1994, four parties responded to the Public Notice seeking comments on BellSouth's petition -- the Bell Atlantic Telephone Companies (Bell Atlantic), Southwestern Bell Telephone Company (Southwestern Bell), Sprint Communications Co., L.P. (Sprint), and MCI Telecommunications Corporation (MCI).[2] Bell Atlantic and Southwestern Bell support BellSouth's petition. They state that they see no material difference between BellSouth's waiver request and the waiver requests filed earlier by Bell Atlantic and Southwestern Bell. Bell Atlantic Comments at 1-2; Southwestern Bell Comments at 1. Furthermore, Bell Atlantic claims that granting these petitions will serve the public interest by promoting competition among interexchange carriers and increasing consumer alternatives. Bell Atlantic Comments at 2.

3. Sprint and MCI oppose BellSouth's petition. They claim that the requested waiver would not be in the public interest because BellSouth has failed to identify any quantifiable public demand for the service. Sprint Comments at 1; MCI Comments at 2. MCI also contends that BellSouth has not satisfied the "good cause" standard for waiver of a Commission rule by showing that it will suffer undue hardship if its waiver request is denied. MCI Comments at 2-3. Finally, Sprint asserts that BellSouth fails to demonstrate that it will establish rates that recover relevant costs in accordance with the cost support requirements of the *Southwestern Bell Operator Transfer Order*.[3] Sprint Comments at 1-2.

4. In its reply, filed October 26, 1994, BellSouth responds that it is not necessay to show a need or to quantify the demand for a service to obtain a Part 69 waiver. BellSouth Reply at 3. Furthermore, BellSouth asserts that it has satisfied fully the public interest finding necessary to justify the grant of a waiver by demonstrating that its operator services will increase IXC's service options, thereby promoting greater competition among IXCs in the delivery of operator assistance services to interLATA traffic. *Id.* at 3. Finally, BellSouth replies that the Commission does not require a cost showing to support a Part 69 waiver request in situations where no tariff transmittal has been filed. *Id.* at 5.

5. Commission rules may be waived if good cause is shown.[4] The Commission may exercise its discretion to waive a rule where the particular facts make strict compliance inconsistent with the public interest.[5] In addition, the United States Court of Appeals for the District of Columbia Circuit has stated that the Commission may take into account considerations of hardship, equity, or more effective implementation of overall policy on an individual basis.[6] Waiver is thus appropriate if special circumstances warrant a deviation from the general rule and such deviation would better serve the public interest than would strict adherence to the general rule.[7]

6. The Bureau has previously considered almost identical waiver requests from Bell Atlantic and Southwestern Bell. It granted those requests, finding that "the proposed offerings of Bell Atlantic and Southwestern Bell would bring IXCs and their customers a greater choice of interstate operator services" and that "[s]uch increased choices would generally foster competition."[8] In addition, the Bu-

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[1] Those four new rate elements include: (1) automated call processing; (2) operator assistance call processing; (3) call recording; and (4) message rating.

[2] Public Notice, BellSouth Petitions for Waiver of Section 69.4 for new Operator-Assistance Services, DA 94-995, released Sept. 13, 1994.

[3] *See* Southwestern Bell Telephone Companies, Transmittal No. 1874, Petition for Waiver of 69.4(b) of the Commission's Rules, 5 FCC Rcd 3452 (Com. Car. Bur. 1990) (*Southwestern Bell Operator Transfer Services Order*).

[4] See Section 1.3 of the Commission's Rules, 47 C.F.R. § 1.3.

[5] Northeast Cellular Tel. Co. v. F.C.C., 897 F.2d 1164 (D.C. Cir. 1990) (*Northeast Cellular*).

[6] WAIT Radio v. F.C.C., 418 F.2d 1153, 1158 (D.C. Cir. 1969), *cert. denied*, 409 U.S. 1027 (1972).

[7] *Northeast Cellular*, 897 F.2d at 1166.

[8] Bell Atlantic Telephone Companies and Southwestern Bell

reau concluded that "grant of the requested waivers would enable Bell Atlantic and Southwestern Bell to establish new rate elements that are tailored precisely to fit their respective services rather than attempting to force their services into existing rate elements." *Id.* at para. 16. Furthermore, the Bureau stated and that "[c]reation of new rate elements would also advance the goals of the Commission's access charge regime by enabling the carriers to better match relevant costs and rate elements, thus allowing Bell Atlantic and Southwestern Bell to better recover the cost of their services from those customers who use them." *Id.* Finally, the Bureau determined that it would be premature to address cost issues in the waiver request because neither Bell Atlantic nor Southwestern Bell had yet filed a tariff transmittal to implement their proposed rate elements. *Id.* at para. 18.

7. We conclude that there is no material difference between Bell Atlantic's and Southwestern Bell's operator call completion services and BellSouth operator assistance service. Thus, as good cause existed to permit those carriers to establish separate rate elements for their services, it exists as well to permit BellSouth to establish rate elements for its Operator Plus service.[9] We further conclude that BellSouth -- like Bell Atlantic and Southwestern Bell -- was not required to address cost issues in its waiver request because its has not yet filed its tariff to offer Operator Plus service. Therefore, we grant BellSouth's waiver request.

8. Accordingly, IT IS ORDERED that, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i) and Sections 0.91 and 0.291 of the Commission's Rules, 47 C.F.R. §§ 0.91, and 0291, the petition for waiver filed by BellSouth Telecommunications, Inc. IS GRANTED to the extent indicated above and otherwise IS DISMISSED as moot.

FEDERAL COMMUNICATIONS COMMISSION

Geraldine A. Matise
Acting Chief, Tariff Division
Common Carrier Bureau

Telephone Company, Petitions for Waiver of Section 69.4(b) of the Commission's Rules, 9 FCC Rcd 7868 (Com. Car. Bur. 1994) (*Bell Atlantic/SWB Call Completion Services Order*).

[9] In the *Bell Atlantic/SWB Call Completion Services Order*, we noted that the Commission detariffed call rating services and call recording services in Detariffing of Billing and Collection Services, Report and Order, 102 FCC 2d 1150, 1151 n.2 (*Billing and Collection Order*), *recon. denied*, 1 FCC Rcd 445 (1986). Thus, it is no longer necessary to secure a waiver of Part 69 to offer call recording or call rating. Accordingly, we dismiss as moot BellSouth's waiver petition with regard to these two rate elements.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

OKLAHOMA BAPTIST UNIVERSITY
Hocker, Oklahoma — File No. BPLIF-931230GG

CLINTON PUBLIC SCHOOLS
Corn, Oklahoma — File No. BPLIF-931230GO

For Construction Permit and License
in the Instructional
Television Fixed Service on
Channels C1, C2, C3, and C4.

MEMORANDUM OPINION AND ORDER

Adopted: March 20, 1995; Released: March 28, 1995

By the Commission:

1. The Commission has before it for consideration the above-captioned mutually exclusive applications of Oklahoma Baptist University (University) and Clinton Public Schools (Clinton), each seeking a construction permit and license in the Instructional Television Fixed Service (ITFS) on Channels C1-C4 in the areas of Hocker and Corn, Oklahoma, respectively.

BASIC ELIGIBILITY

2. Before applying the mutually exclusive selection procedure to determine the number of merit points to be awarded to each applicant, we must first ascertain the basic eligibility of the applicants. Educational institutions and governmental organizations that propose to serve either their own enrolled students or students at accredited schools within their respective jurisdictions establish their eligibility by accreditation from the appropriate state department of education or a recognized regional or national accrediting organization. Other ITFS applicants that propose to serve students at accredited schools outside of their respective jurisdictions must, to be eligible, submit letters of intended use from those schools and establish local program committees in those communities. See 47 C.F.R. Section 74.932(a)(1)-(5). Both applicants are qualified to be ITFS licensees. University is an educational institution that is accredited by the North Central Association of Colleges and Secondary Schools. While University does not propose to serve its own students, it has submitted the requisite letters of intended use from accredited schools that will use its service and has demonstrated the establishment of local programming committees. Clinton is a school system, accredited by the Oklahoma State Department of Education and CHS-North Central Association that proposes to serve the formal educational needs of students enrolled in schools both within and outside its jurisdiction.

MUTUALLY EXCLUSIVE SELECTION PROCEDURE

3. In cases of mutually exclusive ITFS applications, where applicants are competing for the same or adjacent channels in the same geographic area, each application is reviewed pursuant to our comparative process. This procedure awards a maximum of twelve merit points based on five criteria deemed to be most relevant to predicting the applicant best qualified to provide the service for which the ITFS spectrum has been allocated. *Instructional Television Fixed Service - Second Report and Order in MM Docket No. 83-523* (*Second Report and Order*), 101 FCC 2d 49, 65-72 (1985); 47 C.F.R. Section 74.913. First, four points are awarded to local applicants.[1] Second, three points are awarded to applicants which are accredited schools, educational institutions or school boards and school districts applying within their jurisdictions. Third, two points are awarded to applicants whose requests would result in the acquisition by these applicants of four or fewer ITFS channels within the particular area. Fourth, either one or two points may be awarded to applicants for specified levels of proposed ITFS programming.[2] Fifth, one point is awarded to applicants whichare existing E or F channel licensees seeking to relocate on another ITFS channel group, where such applicants show an established need for an expanded service that cannot be accommodated on their grandfathered E or F facilities. The tentative selectee is the applicant with the highest score.

4. Under this comparative selection process, the applicants are awarded points based on the following criteria:

Localism. University is located in Shawnee, Oklahoma, which is over 100 miles from Hocker, the area it seeks to serve. Therefore, it is entitled to no merit points under this criterion. In contrast, Clinton is entitled to four points for being a school system that proposes to serve the formal educational needs of students enrolled at schools within its jurisdiction.

Accreditation. Although University proposes to serve accredited institutions, a factor which satisfies its basic eligibility, it is not an accredited institution in its own right in the area it proposes to serve, the factor necessary for earning merit points under the accreditation criterion. See *Quachita Academy of Arts and Science*, 9 FCC Rcd 7903

[1] A "local" applicant is an institution or organization that is physically located in the community or metropolitan area where service is proposed. *Second Report and Order*, 101 FCC 2d at 59; 47 C.F.R. Section 74.932, Note 1.

[2] One point is awarded for a proposed weekly schedule of at least 21 average hours per channel of formal educational programming or of at least 41 average hours per channel of other ITFS programming. Two points are awarded for a proposed weekly schedule of at least 41 average hours per channel of formal educational programming or at least 61 hours per channel of ITFS programming where at least 21 of those hours are formal educational programming. 47 C.F.R. Section 74.913(b)(4).

(1994). Therefore, it is entitled to no merit points under this criterion. In contrast, Clinton is entitled to three points because it is accredited by the Oklahoma State Department of Education and CHS-North Central Association.

Four-Channel Limitation. Neither applicant is the licensee of, or has filed applications for, additional ITFS channels in its proposed service area. Consequently, each applicant is entitled to two points for remaining within the four-channel limitation.

Instructional Programming. ITFS applicants detail their formal educational and other ITFS programming proposals in both a program schedule and a programming "grid." The illustrative schedules and grids submitted by University and Clinton propose averages of 42 hours of formal educational programming per channel per week. Therefore, each applicant is entitled to two programming merit points.

E- and F- Channel Group Relocation. Neither applicant is the current licensee of an E or F channel seeking to relocate to other channels. Consequently, no applicant is entitled to the one point for such applicants.

Total. University is entitled to two points for observing the four-channel limitation and two points for proposing at least 41 hours for formal educational programming per channel per week, for a total of four points. Clinton is entitled to four points for being local, three points for being accredited, two points for observing the four channel limitation, and two points for proposing at least 41 hours of formal educational programming per channel per week, for a total of eleven points. Thus, Clinton is the tentative selectee.

OTHER MATTERS

5. Clinton proposes to lease excess capacity for non-ITFS use, as permitted by 47 C.F.R. Section 74.931. Clinton has submitted a copy of its lease with Wireless Leasing, Inc., which conforms in all respects with our requirements.

6. No petitions to deny or informal objections have been filed against Clinton's application, and we find Clinton fully qualified to be an ITFS licensee. We also conclude that grant of Clinton's application would serve the public interest, convenience and necessity.

7. Accordingly, IT IS ORDERED, That the application of Oklahoma Baptist University (BPLIF-931230GG) IS DENIED, and the application of Clinton Public Schools (BPLIF-931230GO) IS GRANTED.

8. IT IS FURTHER ORDERED, That the staff of the Mass Media Bureau shall send copies of this decision to the applicants by certified mail, return receipt requested.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

COMANCHE PUBLIC SCHOOL
Lawton, Oklahoma — File No. BPLIF-931230ET

SOUTHWEST AREA VOCATIONAL-TECHNICAL CENTER
Altus, Oklahoma — File No. BPLIF-931230FR

FAXON SCHOOL DISTRICT C-128
Lawton, Oklahoma — File No. BPLIF-931230FV

For Construction Permit and License
in the Instructional
Television Fixed Service on
Channels D1, D2, D3, and D4.

MEMORANDUM OPINION AND ORDER

Adopted: March 20, 1995; Released: March 28, 1995

By the Commission:

1. The Commission has before it for consideration the above-captioned mutually exclusive applications of Comanche Public School (Comanche), Southwest Area Vocational-Technical Center (SAVTC), and Faxon School District C-128 (Faxon), each seeking a construction permit and license in the Instructional Television Fixed Service (ITFS) on Channels D1-D4. Comanche and Faxon propose an ITFS facility in the area of Lawton, Oklahoma, whereas SAVTC proposes a facility in Altus, Oklahoma.

BASIC ELIGIBILITY

2. Before applying the mutually exclusive selection procedure to determine the number of merit points to be awarded to each applicant, we must first ascertain the basic eligibility of the applicants. Educational institutions and governmental organizations that propose to serve either their own enrolled students or students at accredited schools within their respective jurisdictions establish their eligibility by accreditation from the appropriate state department of education or a recognized regional or national accrediting organization. Other ITFS applicants that propose to serve students at accredited schools outside of their respective jurisdictions must, to be eligible, submit letters of intended use from those schools and establish local program committees in those communities. See 47 C.F.R. Section 74.932(a)(1)-(5). All of the applicants are qualified to be ITFS licensees. Comanche and Faxon are school systems that are accredited by the Oklahoma State Department of Education and that propose to serve the formal educational needs of students enrolled in schools under their jurisdictions, as well as in schools under other jurisdictions. SAVTC is an educational institution that is accredited by the Oklahoma State Department of Vo-Tech and that proposes to serve its own students.

MUTUALLY EXCLUSIVE SELECTION PROCEDURE

3. In cases of mutually exclusive ITFS applications, where applicants are competing for the same or adjacent channels in the same geographic area, each application is reviewed pursuant to our comparative process. This procedure awards a maximum of twelve merit points based on five criteria deemed to be most relevant to predicting the applicant best qualified to provide the service for which the ITFS spectrum has been allocated. *Instructional Television Fixed Service - Second Report and Order in MM Docket No. 83-523 (Second Report and Order)*, 101 FCC 2d 49, 65-72 (1985); 47 C.F.R. Section 74.913. First, four points are awarded to local applicants.[1] Second, three points are awarded to applicants which are accredited schools, educational institutions or school boards and school districts applying within their jurisdictions. Third, two points are awarded to applicants whose requests would result in the acquisition by these applicants of four or fewer ITFS channels within the particular area. Fourth, either one or two points may be awarded to applicants for specified levels of proposed ITFS programming.[2] Fifth, one point is awarded to applicants which are existing E or F channel licensees seeking to relocate on anotherITFS channel group, where such applicants show an established need for an expanded service that cannot be accommodated on their grandfathered E or F facilities. The tentative selectee is the applicant with the highest score.

4. Under this comparative selection process, the applicants are awarded points based on the following criteria:

Localism. Comanche and Faxon are entitled to four points for being school systems that propose to serve the formal educational needs of students enrolled at schools within their jurisdictions. SAVTC is also entitled to four points since it is an educational institution that proposes to offer formal educational programming for its own students.

[1] A "local" applicant is an institution or organization that is physically located in the community or metropolitan area where service is proposed. *Second Report and Order*, 101 FCC 2d at 59; 47 C.F.R. Section 74.932, Note 1.

[2] One point is awarded for a proposed weekly schedule of at least 21 average hours per channel of formal educational programming or of at least 41 average hours per channel of other ITFS programming. Two points are awarded for a proposed weekly schedule of at least 41 average hours per channel of formal educational programming or at least 61 hours per channel of ITFS programming where at least 21 of those hours are formal educational programming. 47 C.F.R. Section 74.913(b)(4).

Accreditation. Each applicant is entitled to three points for accreditation. Comanche and Faxon are accredited by the Oklahoma State Department of Education. SAVTC is accredited by the Oklahoma State Department of Vo-Tech.

Four-Channel Limitation. None of the applicants is the licensee of, or has filed applications for, additional ITFS channels in its proposed service area. Consequently, each applicant is entitled to two points for remaining within the four-channel limitation.

Instructional Programming. ITFS applicants detail their formal educational and other ITFS programming proposals in both a program schedule and a programming "grid." Where the amounts and types of programming proposed in the schedule and in the grid are inconsistent, we shall consider as correct, for comparative purposes, the amount and type which result in the least number of points to the applicant, so long as the excess capacity lease permits that level of programming to be transmitted. *See Hispanic Information and Telecommunications Network, Inc.*, 7 FCC Rcd 5924 (1992).

The illustrative schedules and grids submitted by Comanche and SAVTC propose averages of 41 hours of formal educational programming per channel per week. Therefore, Comanche and SAVTC are entitled to two programming merit points apiece. In contrast, Faxon's illustrative schedule and grid propose an average of 6.375 hours of formal educational programming per channel per week and 8.25 hours of other ITFS programming per channel per week. Because the amounts of programming specified in Faxon's illustrative schedule and grid do not reach the threshold amount at which merit points are awarded, Faxon is not entitled to any programming merit points.

E- and F- Channel Group Relocation. None of the applicants is the current licensee of an E or F channel seeking to relocate to other channels. Consequently, no applicant is entitled to the one point for such applicants.

Total. Comanche and SAVTC are entitled to four points for being local, three points for being accredited, two points for observing the four-channel limitation, and two points for proposing at least 41 hours of formal educational programming per channel per week, for a total of eleven points apiece. Faxon is entitled to four points for being local, three points for being accredited, and two points for observing the four-channel limitation, for a total of nine points. The applications of Comanche and Faxon are directly mutually exclusive, and Comanche is therefore the tentative selectee as opposed to Faxon. However, the application of SAVTC is only directly mutually exclusive with that of Faxon. In view of our action denying the application of Faxon, the application of SAVTC may also be granted.

OTHER MATTERS

5. Comanche and SAVTC propose to lease excess capacity for non-ITFS use, as permitted by 47 C.F.R. Section 74.931. Comanche has submitted a copy of its lease with Heartland Wireless Cable, Inc. and SAVTC has submitted a copy of its lease with Southwest Wireless Cable, Inc. Both leases conform in all respects with our requirements.

6. No petitions to deny or informal objections have been filed against the applications of Comanche or SAVTC, and we find both applicants fully qualified to be ITFS licensees. We also conclude that grant of the applications of Comanche and SAVTC would serve the public interest, convenience, and necessity.

7. Accordingly, IT IS ORDERED, That the application of Faxon School District C-128 (BPLIF-931230FV) IS DENIED, and the applications of Comanche Public School (BPLIF-931230ET) and Southwest Area Vocational-Technical Center (BPLIF-931230FR) ARE GRANTED.

8. IT IS FURTHER ORDERED, That the staff of the Mass Media Bureau shall send copies of this decision to the applicants by certified mail, return receipt requested.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

NORTH AMERICAN CATHOLIC EDUCATIONAL PROGRAMMING FOUNDATION, INC.
Eugene, Oregon — File No. BPLIF-920211DA

OREGON STATE SYSTEM OF HIGHER EDUCATION
Eugene, Oregon — File No. BPLIF-930219EO

For Construction Permit and License
in the Instructional
Television Fixed Service on
Channels C1, C2, C3, and C4.

MEMORANDUM OPINION AND ORDER

Adopted: March 20, 1995; Released: March 28, 1995

By the Commission:

1. The Commission has before it for consideration the above-captioned mutually exclusive applications of North American Catholic Educational Programming Foundation, Inc. (NACEPF) and Oregon State System of Higher Education (OSSHE), each seeking a construction permit and license in the Instructional Television Fixed Service (ITFS) on Channels C1-C4 in the area of Eugene, Oregon.

BASIC ELIGIBILITY

2. Before applying the mutually exclusive selection procedure to determine the number of merit points to be awarded to each applicant, we must first ascertain the basic eligibility of the applicants. Educational institutions and governmental organizations that propose to serve either their own enrolled students or students at accredited schools within their respective jurisdictions establish their eligibility by accreditation from the appropriate state department of education or a recognized regional or national accrediting organization. Other ITFS applicants that propose to serve students at accredited schools outside of their respective jurisdictions must, to be eligible, submit letters of intended use from those schools and establish local program committees in those communities. See 47 C.F.R. Section 74.932(a)(1)-(5). Both applicants are qualified to be ITFS licensees. NACEPF, a nonprofit educational organization, has submitted the requisite letters of intended use from accredited schools that will utilize its service and has demonstrated the establishment of local programming committees. OSSHE, accredited by the Northwest Association of Schools and Colleges, proposes to serve the formal educational needs of students enrolled at schools under its jurisdiction.

MUTUALLY EXCLUSIVE SELECTION PROCEDURE

3. In cases of mutually exclusive ITFS applications, where applicants are competing for the same or adjacent channels in the same geographic area, each application is reviewed pursuant to our comparative process. This procedure awards a maximum of twelve merit points based on five criteria deemed to be most relevant to predicting the applicant best qualified to provide the service for which the ITFS spectrum has been allocated. *Instructional Television Fixed Service - Second Report and Order in MM Docket No. 83-523 (Second Report and Order)*, 101 FCC 2d 49, 65-72 (1985); 47 C.F.R. Section 74.913. First, four points are awarded to local applicants.[1] Second, three points are awarded to applicants which are accredited schools, educational institutions or school boards and school districts applying within their jurisdictions. Third, two points are awarded to applicants whose requests would result in the acquisition by these applicants of four or fewer ITFS channels within the particular area. Fourth, either one or two points may be awarded to applicants for specified levels of proposed ITFS programming.[2] Fifth, one point is awarded to applicants which are existing E or F channel licensees seeking to relocate on another ITFS channel group, where such applicants show an established need for an expanded service that cannot be accommodated on their grandfathered E or F facilities. The tentative selectee is the applicant with the highest score.

4. Under this comparative selection process, the applicants are awarded points based on the following criteria:

Localism. NACEPF, based in Providence, Rhode Island, is not entitled to any points under this criterion, because it is not located in the area it proposes to serve. On the other hand, OSSHE is a school system that proposes to serve the formal educational needs of students enrolled at schools within its jurisdiction. Therefore, OSSHE is entitled to four merit points for being local.

Accreditation. Although NACEPF proposes to serve accredited institutions, a factor satisfying its basic eligibility, the applicant is not an accredited entity in its own right in the area it proposes to serve, the status necessary for earning merit points under the accreditation criterion. There-

[1] A "local" applicant is an institution or organization that is physically located in the community or metropolitan area where service is proposed. *Second Report and Order*, 101 FCC 2d at 59; 47 C.F.R. Section 74.932, Note 1.

[2] One point is awarded for a proposed weekly schedule of at least 21 average hours per channel of formal educational programming or of at least 41 average hours per channel of other ITFS programming. Two points are awarded for a proposed weekly schedule of at least 41 average hours per channel of formal educational programming or at least 61 hours per channel of ITFS programming where at least 21 of those hours are formal educational programming. 47 C.F.R. Section 74.913(b)(4).

fore, NACEPF is not entitled to any points by this measure. See *Northern Arizona University Foundation*, 9 FCC Rcd 1549 (1994). In contrast, OSSHE is accredited by the Northwest Association of Schools and Colleges and is entitled to three points under this criterion.

Four-Channel Limitation. Neither applicant is the licensee of, or has filed applications for, additional ITFS channels in its proposed service area. Consequently, each applicant is entitled to two points for remaining within the four-channel limitation.

Instructional Programming. ITFS applicants detail their formal educational and other ITFS programming proposals in both a program schedule and a programming "grid". NACEPF's illustrative schedule and grid propose an average of 20 hours of formal educational programming per channel per week. Because the amount of formal educational programming specified by NACEPF does not establish the threshold amount at which merit points are awarded, NACEPF is entitled to no programming merit points. In contrast, OSSHE's illustrative schedule and grid propose an average of 23.625 hours of formal educational programming per channel per week. Therefore, OSSHE is entitled to one programming merit point.

E- and F- Channel Group Relocation. Neither applicant is the current licensee of an E or F channel seeking to relocate to other channels. Consequently, no applicant is entitled to the one point for such applicants.

Total. NACEPF is entitled to only two points for observing the four-channel limitation. OSSHE is entitled to four points for being local, three points for being accredited, two points for observing the four-channel limitation, and one point for proposing at least 21 hours of formal educational programming per channel per week, for a total of ten points. Thus, OSSHE is the tentative selectee.

OTHER MATTERS

5. No petitions to deny or informal objections have been filed against OSSHE's application, and we find OSSHE fully qualified to be an ITFS licensee. We also conclude that grant of OSSHE's application would serve the public interest, convenience and necessity.

6. Accordingly, IT IS ORDERED, That the application of North American Catholic Educational Programming Foundation, Inc. (BPLIF-920211DA) IS DENIED, and the application of Oregon State System of Higher Education (BPLIF-930219EO) IS GRANTED.

7. IT IS FURTHER ORDERED, That the staff of the Mass Media Bureau shall send copies of this decision to the applicants by certified mail, return receipt requested.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 95-33

In the Matter of

Amendment of Section 73.202(b), RM-8597
Table of Allotments,
FM Broadcast Stations.
(Fairbanks, Alaska)

NOTICE OF PROPOSED RULE MAKING

Adopted: March 22, 1995; Released: March 29, 1995

Comment Date: May 22, 1995
Reply Comment Date: June 6, 1995

By the Chief, Allocations Branch:

1. The Commission considers herein the petition for rule making filed by Northern Television, Inc. ("petitioner") requesting the allotment of FM Channel 245C3 to Fairbanks, Alaska, as that community's sixth local FM broadcast service. Petitioner stated its intention to apply for Channel 245C3 if it is allotted to Fairbanks, and if authorized, to construct a station promptly, as required by the Commission in the Appendix to the *Notice*.[1]

Technical Statement

2. A staff review of the proposal reveals that Channel 245C3 can be allotted to Fairbanks, Alaska, in conformity with the minimum distance separation requirements of Section 73.207(b)(1) and (2) of the Commission's Rules without a site restriction, at coordinates North Latitude 64-50-16 and West Longitude 147-42-59. Additionally, as Fairbanks is located within 320 kilometers (199 miles) of the United States-Canadian border, the Commission must obtain the concurrence of the Canadian government in the proposal.

3. In view of an interest having been expressed in providing an additional local FM service to Fairbanks, Alaska, we will propose to allot Channel 245C3 to that community. Accordingly, we will seek comments on the proposed amendment to the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to Fairbanks, Alaska, as follows:

City	Channel No. Present	Proposed
Fairbanks, Alaska	240C3, 251C2, 266C2, 273C1, 284C3	240C3, 245C3, 251C2,266C2, 273C1, 284C3

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **May 22, 1995**, and reply comments on or before **June 6, 1995**, and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, as follows:

Northern Television, Inc.
Attn: Henry H. Hove, President
Fairbanks Division
3528 International Way
Fairbanks, AK 99701

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 418-2180. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation

[1] Although the petitioner's request was signed, it failed to include an affidavit verifying that the statements contained in the petition are accurate to the best of its knowledge. Section 1.52 of the Commission's Rules requires that the original of any document filed with the Commission by a party not represented by counsel be signed and verified by the party and his/her address stated. In the absence of such verification, the petition may be dismissed. Section 1.401(b) of the Commission's Rules concerning rule making proceedings places petitioners on notice that their proposal must conform with the requirements of Section 1.52 regarding subscription and verification. *See also Amendment of Sections 1.420 and 73.3584 of the Commission's Rules Concerning Abuses of the Commission's Processes*, 5 FCC Rcd 3911, 3919 n.41 (1990). The petitioner is requested to rectify this omission in its comments.

and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority contained in Sections 4(i), 5(c)(1),303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 95-34

In the Matter of

Amendment of Section 73.202(b) RM-8600
Table of Allotments,
FM Broadcast Stations.
(Rapid City, South Dakota)

NOTICE OF PROPOSED RULE MAKING

Adopted: March 22, 1995; Released: March 29, 1995

Comment Date: May 22, 1995
Reply Comment Date: June 6, 1995

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Conway Broadcasting ("petitioner"), proposing the allotment of Channel 222C at Rapid City, South Dakota, as the community's seventh local FM transmission service.[1] Petitioner states its intention to apply for the channel, if allotted.

2. We believe the petitioner's proposal warrants consideration because the proposed allotment could provide Rapid City with its seventh local FM transmission service. An engineering analysis has determined that Channel 222C can be allotted to Rapid City in compliance with the Commission's minimum distance separation requirements at city reference coordinates.[2]

3. Accordingly, we will seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Rapid City, South Dakota	230C1, 250C1, 254C1, 262C1 281C1	222C, 230C1, 250C1,254C1, 262C1, 281C1 292C[3]

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **May 22, 1995**, and reply comments on or before **June 6, 1995**, and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Lars Conway
Conway Broadcasting
4415 Fremont Ave., South
Minneapolis, Minnesota 55409
(Petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules,* 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Sharon P. McDonald, Mass Media Bureau, (202) 418-2180. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

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[1] On November 4, 1994, petitioner filed a petition proposing the allotment of Channel 292C at Rapid City, South Dakota, as its sixth local FM transmission service. We note that Commission policy states that "[i]n markets with fewer than 15 stations where the 'less than 50 percent' standard would permit ownership of three stations, an entity may not own three same service stations; pursuant to the new local rules, no more than two of those three stations may be in the same service." Accordingly, petitioner is eligible to apply for two FM channels at Rapid City. *See Revision of Radio Rules and Policies (Memorandum Opinion and Order)*, 7 FCC Rcd 6387 (1992), n.44.

[2] The coordinates for Channel 222C at Rapid City are North Latitude 44-04-50 and West Longitude 103-13-50.

[3] On November 30, 1994, a *Notice of Proposed Rule Making* was adopted proposing the allotment of Channel 292C at Rapid City, South Dakota. *See* MM Docket No. 94-140, 9 FCC Rcd 7290 (1994).

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1),303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

ST. THOMAS AND SAN JUAN TELEPHONE CO. File No. I-T-C-95-024

Application for authority to acquire and operate facilities for service between the U.S. and France.

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: December 27, 1994; Released: March 29, 1995

By the Chief, Telecommunications Division:

1. Upon consideration of the above-captioned uncontested application, filed pursuant to Section 214 of the Communications Act of 1934, as amended, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision of direct service between the United States and France by St. Thomas and San Juan Telephone Co. (STSJ).

2. Accordingly, IT IS ORDERED that application File No. I-T-C-95-024 IS GRANTED and STSJ is authorized to utilize previously authorized facilities between the U.S. Virgin Islands and Guadeloupe, in conjunction with facilities furnished by its correspondent in France, to provide STSJ's regularly authorized services between the United States and France.

3. IT IS FURTHER ORDERED that our authorization of STSJ to provide private lines as part of its authorized services is limited to the provision of such private lines only between the United States and France -- that is, private lines which originate in the United States and terminate in France or which originate in France and terminate in the United States. In addition, STSJ may not -- and STSJ's tariff must state that its customers may not -- connect private lines provided over these facilities to the public switched network at either the U.S. or France end, or both, for the provision of international basic telecommunications services, including switched voice services, unless authorized to do so by the Commission upon a finding that France affords resale opportunities equivalent to those available under U.S. law, in accordance with *Regulation of International Accounting Rates, Phase II, First Report and Order*, 7 FCC Rcd 559 (1991), Order on Reconsideration and Third Further Notice of Proposed Rulemaking, 7 FCC Rcd 7927 (1992), *petition for reconsideration pending*.

4. IT IS FURTHER ORDERED that neither STSJ nor any persons or companies directly or indirectly controlling or controlled by STSJ, or under direct or indirect common control with it, shall acquire or enjoy any right, for the purposes of handling or interchanging traffic to or from the United States, its territories or possessions, which is denied to any other United States carrier by reason of any concession, contract, understanding, or working arrangement to which STSJ or any persons or companies controlling or controlled by STSJ are parties.

5. IT IS FURTHER ORDERED that the applicant shall file copies of any operating agreement it enters into with its foreign correspondent with the Commission within 30 days of its execution, and shall otherwise comply with the filing requirements contained in Section 43.51 of the Commission's Rules, 47 C.F.R. §43.51.

6. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. §203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the service authorized in this Order.

7. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61.

8. IT IS FURTHER ORDERED that the applicant shall file semi-annual circuit reports pursuant to Section 63.15(b) of the Commission's Rules, 47 C.F.R. §63.15(b).

9. This order is issued under Section 0.261 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

Diane J. Cornell
Chief, Telecommunications Division
International Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

LITEL TELECOMMUNICATIONS CORPORATION,
Complainant,

v.

INDIANA BELL TELEPHONE COMPANY, INC.,	File No. E-92-30
THE OHIO BELL TELEPHONE COMPANY,	File No. E-92-31
WISCONSIN BELL, INC.,	File No. E-92-32
ILLINOIS BELL TELEPHONE COMPANY, and	File No. E-92-38
MICHIGAN BELL TELEPHONE COMPANY,	File No. E-92-39

Defendants.

ORDER

Adopted: March 21, 1995; Released: March 29, 1995

By the Chief, Formal Complaints and Investigations Branch, Enforcement Division, Common Carrier Bureau:

1. On January 29, 1992, LiTel Telecommunications Corporation filed the above-captioned complaints against the defendants seeking to recover damages from the defendants for alleged violations of the Commission's rules in connection with the defendants' computation and assessment of terminating carrier common line ("CCL") charges. On March 13, 1995, the parties filed a joint motion to dismiss the complaints stating that the parties have negotiated a mutually agreeable settlement of all pending controversies.

2. We are satisfied that granting the parties' joint motion to dismiss the complaints with prejudice will serve the public interest by eliminating the need for further litigation and the expenditure of further time and resources of the parties and of the Commission.

3. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and the authority delegated in Section 0.291 of the Commission's rules, 47 C.F.R. § 0.291, that the parties' Joint Motion to Dismiss IS GRANTED.

4. IT IS FURTHER ORDERED that the above-captioned complaints ARE DISMISSED WITH PREJUDICE and the proceedings ARE TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Thomas D. Wyatt
Chief, Formal Complaints and
Investigations Branch
Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

MCI TELECOMMUNICATIONS CORPORATION,
Complainant and Counterclaim Defendant,

v. File No. E-94-63

AT&T CORP.,
Defendant and Counterclaimant.

ORDER

Adopted: March 23, 1995; Released: March 29, 1995

By the Chief, Formal Complaints and Investigations Branch, Enforcement Division, Common Carrier Bureau:

1. On April 26, 1994, MCI Telecommunications Corporation (MCI) filed the above-captioned complaint against AT&T Corp. (AT&T), alleging that AT&T had tariffed certain promotions that were unlawfully discriminatory and in violation of Section 202 of the Communications Act of 1934, as amended, 47 U.S.C. § 202. On June 20, 1994, AT&T filed a counterclaim in which it alleged that certain MCI offerings were also unlawfully discriminatory.

2. On March 1, 1995, MCI and AT&T filed a Joint Motion to Dismiss the MCI complaint and the AT&T counterclaim, stating that the parties had settled the differences which had resulted in the filing of the complaint and the counterclaim.

3. We are satisfied that granting the Joint Motion will serve the public interest by eliminating the need for further litigation and the expenditure of further time and resources by the parties and by the Commission.

3. Accordingly, IT IS ORDERED, pursuant to Sections 1, 4(i), 4(j), and 208 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 208, and the authority delegated under Section 0.291 of the Commission's rules, 47 C.F.R. § 0.291, that the Joint Motion to Dismiss IS GRANTED WITH PREJUDICE and the proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Thomas D. Wyatt
Chief, Formal Complaints and
Investigations Branch
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

NCP Cellular Limited Partnership — File No. 00865-CL-AL-1-94

For assignment of Station KNKQ383 in the Domestic Public Cellular Telecommunications Service on Frequency Block A, in Market 675, Utah-3-Juab

MEMORANDUM OPINION AND ORDER

Adopted: March 23, 1995; Released: March 29, 1995

By the Chief, Wireless Telecommunications Bureau:

I. INTRODUCTION

1. NCP Cellular Limited Partnership (NCP) filed an application for authorization to assign its interest in Utah 3 to Triad Utah, L.P. (Triad). This assignment application was listed on public notice December 2, 1993.[1] No petitions were received within 30 days of this notice and the assignment application was granted on January 13, 1994. On February 14, 1994, Catherine Ferri filed a petition for reconsideration of this assignment of license. NCP opposes the petition and Triad has filed a motion to strike Ferri's petition for reconsideration. For the reasons stated below, we dismiss Ferri's petition.

II. DISCUSSION

2. Ferri's petition is defective. The assignment application seeking authorization to assign the Utah 3 license to Triad was listed on public notice on December 2, 1993. Ferri did not object to that assignment, and the application was granted January 13, 1994. Ferri's petition, filed on February 14, 1994, fails to comply with Section 1.106(b)(1) of the Commission's Rules.[2] That rule requires that a person not a party to a proceeding state with particularity the manner in which [her] interests are adversely affected by the action taken. It further requires that the petitioner show good reason why it was not possible for her to participate in the earlier stages of the proceeding. Ferri offers no explanation for not doing so. Therefore, Ferri's petition is dismissed.

III. CONCLUSION AND ORDERING PARAGRAPH

3. We find that the petition for reconsideration filed by Catherine Ferri is procedurally defective. We therefore dismiss Ferri's petition for reconsideration. Accordingly, IT IS ORDERED THAT Catherine Ferri's petition for reconsideration of the assignment of license from NCP Limited Partnership to Triad Utah, L.P. IS DISMISSED.

4. IT IS FURTHER ORDERED THAT the opposition filed by NCP Limited Partnership and the motion to strike filed by Triad Utah, L.P. ARE GRANTED TO THE EXTENT INDICATED.

FEDERAL COMMUNICATIONS COMMISSION

Regina M. Keeney
Chief, Wireless Telecommunications Bureau

[1] Report No. CL-94-18, released December 2, 1993.
[2] 47 C.F.R. §1.106(b)(1).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 94-67

In the Matter of

Amendment of Section 73.202(b), RM-8481
Table of Allotments,
FM Broadcast Stations.
(Collegeville, Minnesota)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: March 16, 1995; Released: March 28, 1995

By the Chief, Allocations Branch:

1. Before the Commission for consideration is the *Notice of Proposed Rule Making*, 9 FCC Rcd 3119 (1994), issued in response to a petition filed by Saint John's University ("petitioner"). The *Notice* proposed the allotment of Channel 260A to Collegeville, Minnesota, and reservation of the channel for noncommercial educational use. Petitioner filed comments restating its interest in Channel 260A. WJON Broadcasting Company, a Limited Partnership ("WJON"), filed informal comments supporting the allotment of a noncommercial educational channel at Collegeville. No other comments were received.

2. As stated in the *Notice*, noncommercial educational stations generally operate within the reserved portion of the FM band (201-220). Exceptions have been made in cases where channels in the noncommercial educational band are not available because of foreign allocation (Canadian or Mexican) or potential interference to operations on VHF Television Channel 6. Here, according to the petitioner, there are no noncommercial educational channels available for use at Collegeville because of the community's proximity to other noncommercial stations and the reservation of a channel will be the only way to provide additional educational programming to Collegeville. The *Notice* further indicated that Channel 260A was the only Class A channel that could be allotted to Collegeville and that expressions of interest for the use of the channel as a commercial facility should be made during the comment period.

3. In reviewing this proceeding, we discovered that we erroneously proposed reservation of a channel at Collegeville. The *Notice* should only have proposed allotment of a channel to Collegeville. The proposal does not meet the guidelines established to reserve a channel in the commercial band. We note that Collegeville will not be denied noncommercial educational service as Stations KNSR, Channel 205C1, Station KSJR, Channel 211C1, and Station KSJU, Channel 234D will continue to serve the community.[1] It should be noted that if other expressions of interest had been filed, Channel 260A could have been allotted to Collegeville and made available for application by petitioner and all other parties.[2] Based on the record before us, we will not allot Channel 260A to Collegeville, Minnesota, and reserve the channel for noncommercial educational use.

4. IT IS FURTHER ORDERED, That the request of Saint John's University for the allotment of Channel *260A to Collegeville, Minnesota (RM-8481) IS DENIED.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 418-2180.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] Petitioner is the licensee of Station KSJU.

[2] Although not a decisional factor in the outcome of this proceeding, had we received comments expressing interest in the use of Channel 260A as a commercial channel, parties would have been required to establish community status for Collegeville, as was requested in the *Notice*. *See Mokelumme Hill, California*, 4 FCC Rcd 7108 (1989).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-66

In the Matter of

Amendment of Section 73.202(b), RM-8192
Table of Allotments,
FM Broadcast Stations.
(Huntsville and Willis, Texas)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: March 17, 1995; Released: March 28, 1995

By the Chief, Allocations Branch:

1. At the request of New Wavo Communication Group, Inc. ("petitioner"), licensee of Station KVST(FM), Channel 279C3, Huntsville, Texas, the Commission has before it the *Notice of Proposed Rule Making*, 8 FCC Rcd 2220 (1993), proposing the reallotment of Channel 279C3 from Huntsville to Willis, Texas, and the modification of Station KVST(FM)'s license to specify Willis as its community of license. Petitioner filed comments in support of the proposal and a statement for the record.[1] No other comments were received.

2. In the *Notice* petitioner was requested to provide information regarding reception service losses and gains that would result from the adoption of this proposal, as well as any other information regarding the public interest benefits that would accrue from the modification of Station KVST(FM)'s license to specify Willis instead of Huntsville as its community of license. In response, petitioner states that the proposed reallotment of Channel 279C3 to Willis would result in a preferential arrangement of allotments because it provides Willis with its first local aural transmission service while Huntsville will retain five local services. Petitioner submits that KVST(FM) presently only serves 127,135 persons while adoption of its proposal will permit service to 217,561 persons within KVST(FM)'s 60 dBu contour resulting in a "net gain" of 90,426 persons. Petitioner contends the gain area will contain 128,231 persons and the loss area will only contain 37,805 persons, with no white or gray areas created.[2]

3. *Discussion.* We believe that it is in the public interest to reallot Channel 279C3 form Huntsville to Willis, Texas, and to modify Station KVST(FM)'s license accordingly since this would result in a preferential arrangement of allotments pursuant to the Commission's change of community procedure. *See Modification of FM and TV Authorizations to Specify a New Community of License*, 4 FCC Rcd 4870 (1989), *recon. granted in part*, 5 FCC Rcd 7094 (1990). Under those procedures, we compare the existing arrangement of allotments with the proposed arrangement of allotments using our FM allotment priorities.[3]

4. In making this comparison, we find that the proposed reallotment of Channel 279C3 from Huntsville to Willis triggers priority 3 because Willis (population of 2,764) would be provided with its first local aural transmission service. This proposed reallotment would not remove the sole local transmission service from Huntsville (population of 12,800),[4] as Stations KCEY(FM), KSHU(FM), KSAM(AM)(FM), and KYLR(AM) will remain in the community. By way of contrast, retaining the existing arrangement of allotments would not trigger priority 3 because there are already six local transmission services in Huntsville, including petitioner's Station KVST(FM) but would instead trigger lower allotment priority 4 – other public interest factors. Since the proposed reallotment triggers a higher allotment priority, it should be favored.

5. We do not believe that this result should be changed after consideration of the gains and losses of reception service that would occur by Station KVST(FM)'s reallotment and relocation of its transmitter site. We note that the proposed reallotment would result in a net gain of 88,371 persons.[5] At, the same time, we also note that it will create a loss area to 12,855 persons. However, our concerns about this loss area are mitigated by the fact that a majority of the population in the loss area (8,227 persons) will remain well-served with at least five full-time aural reception services. Further, of the remaining persons in the loss area, all but 230 persons would continue to receive at least three full-time reception services.[6]

6. Channel 279C3 can be allotted to Willis in compliance with the Commission's minimum distance separation requirements with a site restriction of 5.3 kilometers (3.3 miles) northwest to accommodate petitioner's desired site.[7] In accordance with Section 1.420(i) of the Commission's Rules, we will modify the license of Station KVST(FM) to specify Willis, Texas, as its community of license.

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[1] Petitioner's statement for the record denotes the lack of other commenters in this proceeding, however, states that it reserves its right to file reply comments if any such comments were filed.

[2] White area refers to an area in which there are no full-time aural reception services, and gray area refers to an area in which there is only one full-time aural reception service.

[3] The FM priorities are: (1) first aural service, (2) second aural service, (3) first local service, and (4) other public interest matters. Co-equal weight is given to priorities (2) and (3). *See Revision of FM Assignment Polices and Procedures*, 90 FCC 2d 88 (1982).

[4] Population figures taken from the 1990 U.S. Census.

[5] The net gain in population were derived by comparing the current and proposed service areas of the proposal (*i.e.*, 241,051 persons in the gain area of Willis minus 152,680 persons in the loss area of Huntsville).

[6] Specifically, of the remaining 4,628 persons in the loss area, some 3,120 persons would retain four services, 1,278 persons would continue to receive three services, and 230 persons would retain two services.

[7] The coordinates for Channel 279C3 at Willis are North Latitude 30-26-55 and West Longitude 95-31-48.

7. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **May 12, 1995**, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Huntsville, Texas	259A, 269A
Willis, Texas	279C3

8. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the license of New Wavo Communication Group, Inc., for Station KVST(FM), IS MODIFIED to specify Willis, Texas, in lieu of Huntsville, Texas, as its community of license, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301).

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental assessment pursuant to Section 1.1307 of the Commission's Rules.

9. Pursuant to Commission Rule Section 1.1104(1(k) and (2)(k), any party seeking a change of community of license of an FM or television allotment or an upgrade of an existing FM allotment, if the request is granted, must submit a rule making fee when filing its application to implement the change in community of license and/or upgrade. As a result of this proceeding, New Wavo Communication Group, Inc., licensee of Station KVST(FM), is required to submit a rule making fee in addition to the fee required for the applications to effect the change in community of license and/or upgrade.

10. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

11. For further information concerning this proceeding, contact Pam Blumenthal, Mass Media Bureau, (202) 418-2180.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-185

In the Matter of

Amendment of Section 73.202(b),	RM-8249
Table of Allotments,	
FM Broadcast Stations.	
(Estes Park, Colorado)	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: March 21, 1995; Released: March 28, 1995

By the Chief, Allocations Branch:

1. Before the Commission for consideration is the *Notice of Proposed Rule Making*, 8 FCC Rcd 4490 (1993), issued in response to a petition filed by Hambric Associates ("petitioner") proposing the allotment of Channel 271A to Estes Park, Colorado, as that community's first local FM service. Supporting comments were filed on behalf of the petitioner. Additionally, comments were filed by Steven R. Coffin ("Coffin"),[1] general manager of Station KRKI(AM) (formerly Station KSIR(AM)), Estes Park, Colorado, to which petitioner responded.

2. We believe the public interest would be served by allotting Channel 271A to Estes Park since it could provide a first local FM service to the community.

Technical Statement

3. As stated in the *Notice*, Channel 271A can be allotted to Estes Park consistent with the minimum distance separation requirements of Section 73.207(b)(1) of the Commission's Rules, provided the transmitter is located at least 3.6 kilometers (2.3 miles) west of the community at coordinates 40-22-22 and 105-33-45. The siterestriction is required to avoid short spacing to the licensed site of Station KTRR(FM), Channel 273C2, Loveland, Colorado, at coordinates 40-27-19 and 104-55-25.

4. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **May 12, 1995**, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED to include Estes Park, Colorado, as follows:

City	Channel No.
Estes Park, Colorado	271A

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. The window period for filing applications for Channel 271A at Estes Park, Colorado, will open on **May 12, 1995**, and close on **June 12, 1995**.

7. For further information concerning the above, contact Nancy Joyner, Mass Media Bureau, (202) 418-2180. Questions related to the application filing process for Channel 271A at Estes Park, Colorado, should be addressed to the Audio Services Division, FM Branch, Mass Media Bureau, (202) 418-2700.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] Coffin's comments were not served on the petitioner, in violation of Section 1.420 of the Commission's Rules. *See also* paragraph 4 of the Appendix to the *Notice*. As Coffin's comments constitute an *ex parte* presentation, they will not be considered in this proceeding. *See* Sections 1.1200, 1.1202(b)(1) and 1.1208 of the Commission's Rules. As a result of our determination, petitioner's responsive comments related thereto will not be considered.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 94-144

In the Matter of

Amendment of Section 73.202(b), RM-8554
Table of Allotments,
FM Broadcast Stations.
(Dickeyville, Wisconsin)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: March 21, 1995; Released: March 28, 1995

By the Chief, Allocations Branch:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 9 FCC Rcd 7816 (1994), issued in response to a petition filed by James F. Munson ("petitioner"). The *Notice* proposed the allotment of Channel 266A to Dickeyville, Wisconsin, as that community's first local service. Petitioner filed comments reaffirming his interest in the allotment of Channel 266A at Dickeyville. Dri-Five, Inc., a Wisconsin corporation, filed supporting comments.

2. We believe the public interest would be served by allotting Channel 266A to Dickeyville, Wisconsin, as it will provide the community with its first local transmission service. Channel 266A can be allotted to Dickeyville in compliance with the Commission's spacing requirements without a site restriction.[1]

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **May 12, 1995**, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

Community	Channel No.
Dickeyville, Wisconsin	266A

3. The window period for filing applications for Channel 266A at Dickeyville, Wisconsin, will open on **May 12, 1995**, and close on **June 12, 1995**.

4. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

5. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 418-2180.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] The coordinates for Channel 266A at Dickeyville are 42-37-38 and 90-35-31.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-278

In the Matter of

Amendment of Section 73.202(b), RM-8344
Table of Allotments,
FM Broadcast Stations.
(Pequot Lakes, Minnesota)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: March 21, 1995; Released: March 28, 1995

By the Chief, Allocations Branch:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 8 FCC Rcd 8142 (1993), proposing the allotment of Channel 261A to Pequot Lakes, Minnesota, as that community's second FM broadcast service. The *Notice* was issued in response to a petition filed by Minnesota Christian Broadcasters, Inc. ("petitioner"). Petitioner filed comments in support of the allotment of Channel 261A at Pequot Lakes and stated its intention to file an application for the channel, if allotted. No other comments were received.

2. In response to the *Notice*, petitioner states that although it is the licensee of Station KTIG, Channel 274C2 in Pequot Lakes, it is eligible to acquire a second FM station in the community.[1] Petitioner's engineering statement indicates that the composite service area for Station KTIG and the proposed station on Channel 261A would be served by a total of four AM stations and nine FM stations. Petitioner contends that since Station KTIG and proposed Channel 261A represent less than fifty percent of the FM stations in the market, it would be eligible to acquire the proposed FM channel pursuant to Section 73.3555(a)(1)(i) of the Commission's Rules.[2]

3. We believe the public interest would be served by allotting Channel 261A to Pequot Lakes, Minnesota, in order to provide the community with an additional FM broadcast service. As indicated in the *Notice*, Channel 261A can be allotted to Pequot Lakes in compliance with the Commission's Rules without a site restriction.[3] We do note, however, that grant of a final license may be withheld until Station KTIG, Channel 261A, is licensed on Channel 274C2. Since Pequot lakes is located within 320 kilometers (200 miles) of the U.S.-Canadian border, concurrence of the Canadian border has been obtained for this allotment.

4. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **May 12, 1995** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

Community	Channel No.
Pequot Lakes, Minnesota	261A, 274C2

5. The window period for filing applications for Channel 261A at Pequot Lakes will open on **May 12, 1995**, and close on **June 12, 1995**.

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 418-2180.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] The license for Station KTIG was modified in MM Docket 92-102 to specify operation on Channel 274C2 in lieu of Channel 261A. *See* 7 FCC Rcd 6215 (1992). Petitioner was granted a construction permit for Channel 274C2 (BPH-921215IG) and filed an application for a license which was put on public notice on November 8, 1994 (BLH-941019KE).

[2] *See Revision of Radio Rules and Policies, Memorandum Opinion and Order and Further Notice of Proposed Rule Making*, 7 FCC Rcd 6387 (1992). For stations in markets with fewer than 15 radio stations, a single licensee will be permitted to own up to three stations, no more than two of which are in the same service, provided that the owned stations represent less than 50 percent of the stations in the market. We note that although petitioner made a showing of eligibility in response to the *Notice*, the analysis made at the application stage will determine compliance with the multiple ownership rules.

[3] The coordinates for Channel 261A at Pequot Lakes are 46-36-11 and 94-18-33.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 94-82

In the Matter of

Amendment of Section 73.202(b),	RM-8487
Table of Allotments,	
FM Broadcast Stations.	
(Spencer and Sac City, Iowa,	
St. James, Minnesota)	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: March 22, 1995; Released: March 28, 1995

By the Chief, Allocations Branch:

1. At the request of Iowa Great Lakes Broadcasting Company, Inc. ("petitioner"), the Commission has before it the *Notice of Proposed Rule Making and Order to Show Cause*, 9 FCC Rcd 3410 (1994), proposing the substitution of Channel 285C2 for Channel 285A at Spencer, Iowa, and the modification of Station KIGL(FM)'s license to specify operation on the higher class channel. To accommodate the allotment of Channel 285C2 at Spencer, the *Notice* also proposed the substitution of Channel 268A for Channel 285A at St. James, Minnesota, and the modification of Station KXAX's license accordingly, as well as the deletion, without replacement, of vacant and unapplied-for Channel 284A at Sac City, Iowa. Comments were filed by the petitioner, Curtis J. Rogers ("Rogers"), and Kevin Lein ("Lein"). Reply comments were filed by the petitioner.[1]

2. Rogers, in his comments, states an intention to apply for Channel 284A at Sac City and thus requests that the channel not be deleted as proposed in the *Notice*. Lein also requests the retention of Channel 284A at Sac City, pointing out that on August 1, 1994, he filed an application for use of the channel (BPH-940801MA). He states that it is long-standing Commission policy not to delete a channel in which an interest has been expressed absent a compelling showing. In this case, Lein points out that Channel 284A would provide Sac City with its first local aural service while the allotment of Channel 285C2 to Spencer would only result in an improvement in existing service. Therefore, he argues that the retention of Channel 284A at Sac City is to be preferred under the Commission's allotment priorities.[2]

3. The petitioner filed comments supporting the channel allotments specified in the *Notice*. However, in light of the application for Channel 284A at Sac City, petitioner alternatively proposed three allotment schemes. It also stated its intention to apply for whatever channel is ultimately allotted to Spencer. The first option is as follows:

Option I

	Channel No.	
City	Present	Proposed
Sac City, Iowa	284A	240A
Spencer, Iowa	285A, 299C1	285C2, 299C1
St. James, Minnesota	263C2, 285A	263C2, 268A

According to the petitioner, Channel 240A can be allotted to Sac City in lieu of Channel 284A, thus providing a channel for use by Lein and any other interested party. Petitioner states that the channel can be allotted to Sac City in compliance with the Commission's minimum distance separation requirements even though there is a short-spacing to Channel 240C2 at Estherville, Iowa. It submits that the license of Station KILR-FM, Estherville, was modified in rule making to specify operation on Channel 240C2 in lieu of Channel 240A and a construction permit (BPH-890110IC) was issued specifying Class C2 facilities. *See* 3 FCC Rcd 5219 (1988). However, petitioner points out that this permit was cancelled by the Commission on August 3, 1992, and Station KILR-FM now seeks permission to operate on Channel 240 as a 6 kW Class A station (BMLH-901029KA). The substitution of Channel 268A for Channel 285A at St. James would also enable Station KXAX to operate with 6 kW power. The second option is as follows:

Option II

	Channel No.	
City	Present	Proposed
Sac City, Iowa	284A	284A
Spencer, Iowa	285A, 299C1	285C3, 299C1
St. James, Minnesota	263C2, 285A	263C2, 268A

Option II would allow Station KIGL(FM) at Spencer to upgrade from Class A to Class C3. While it would still require that Station KXAX at St. James operate on Channel 268A instead of its present Channel 285A, it would not require a change of channel at Sac City. Option III is as follows:

[1] After the record closed, Lein filed a "Statement for the Record" and the petitioner filed an "Additional Statement for the Record" supporting the acceptance of Lein's Statement. We will not accept these late-filed pleadings. The Commission's Rules do not contemplate the filing of pleadings beyond the comment periods specified in the *Notice* and, in light of the action taken herein, provide no information of decisional significance.

[2] The allotment priorities are as follows: (1) first fulltime aural service; (2) second fulltime aural service; (3) first local service; and (4) other public interest matters. Co-equal weight is given to priorities (2) and (3). *See Revision of FM Assignment Policies and Procedures*, 90 FCC 2d 88 (1982).

Option III

City	Channel No. Present	Proposed
Sac City, Iowa	284A	284A
Spencer, Iowa	285A, 299C1	285A, 299C1
St. James, Minnesota	263C2, 285A	263C2, 268A

Option III would not result in a change of class for Station KIGL(FM) but would enable both KIGL(FM) and KXAX to operate as 6 kW Class A stations. The only channel change required by Option III is the substitution of Channel 268A for Channel 285A at St. James.

DISCUSSION

4. After careful consideration of the information before us, we conclude that the public interest would be served by substituting Channel 285C3 for Channel 285A at Spencer, substituting Channel 268A for Channel 285A at St. James, and retaining Channel 284A at Sac City. It is long-established Commission policy not to delete a channel from a community where interest in its use has been expressed absent a compelling public interest benefit. Here, we have both an application filed by Lein as well as a stated intention to file an application by Rogers. We have been provided with no information which would lead us to find that the improvement of an existing service from a Class A to a Class C2 rather than a Class C3 at Spencer would better serve the public interest than the activation of a first local aural service at Sac City. Further, the substitution of Channel 284A at Sac City with Channel 240A is not technically viable since would be short-spaced to Channel 240C2 at Estherville, Iowa, which is reserved for Station KILR-FM. While it is true that Station KILR-FM's 1989 Class C2 construction permit was cancelled, the Commission has not determined that Station KILR-FM is ineligible to submit a new construction permit application specifying operation on Channel 240C2. The modification of Station KIGL(FM)'s license to specify the Class C3 channel will still enable the station to expand its coverage area, thus improving its service, and also enable Station KXAX to increase its power from 3 kW to 6 kW.

5. Rogers Broadcasting, Inc. has not responded to the *Order to Show Cause*. Therefore, we deem it to have consented to the modification of its license for Station KXAX. Pursuant to Commission policy, the petitioner is required to reimburse the licensee of Station KXAX for the reasonable costs incurred in changing its operating frequency and has stated its willingness to do so. *See Circleville, Ohio*, 8 FCC 2d 159 (1967).

Technical Summary

6. Channel 285C3 can be allotted to Spencer in compliance with the Commission's minimum distance separation requirements with a site restriction of 17 kilometers (10.5 miles north to avoid a short-spacing to unoccupied but applied-for Channel 284A at Sac City, Iowa, and to accommodate petitioner's desired transmitter site.[3] Channel 268A can be allotted to St. James, Minnesota, in compliance with the Commission's minimum distance separation requirements at the presently licensed transmitter site of Station KXAX.[4] We recognize that Channel 268A at St. James conflicts with the present operation of Station KAYL-FM, Storm Lake, Iowa, on Channel 268C1. However, pursuant to the *Report and Order* in MM Docket 92-155, Station KAYL-FM has been ordered to modify its operation to Channel 269C1. *See* 8 FCC Rcd 4086 (1993). Therefore, since its continued operation on Channel 268C1 conflicts with the decision herein, we shall send a copy of this decision to Northwest Iowa Broadcasting Corp, licensee of Station KAYL-FM. Issuance of a license to Station KXAX, St. James, may be withheld until Station KAYL-FM is licensed on Channel 269C1 in accordance with MM Docket 92-155.

7. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **May 12, 1995**, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the communities listed below, to read as follows:

City	Channel No.
Spencer, Iowa	285C3, 299C1
St. James, Minnesota	263C2, 268A

8. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Rogers Broadcasting, Inc., for Station KXAX, St. James, Minnesota, IS MODIFIED to specify operation on Channel 268A in lieu of Channel 285A, subject to the following conditions:

(a) Nothing contained herein shall be construed as authorizing any change in Station KXAX's license, BLH-830909AB, except the channel as specified above. Any other changes, except those so specified under Section 73.1690 of the Rules, require prior authorization pursuant to an application for construction permit (FCC Form 301).

(b) Program tests may be conducted in accordance with the provisions of Section 73.1620 of the Rules, PROVIDED the transmission facilities comply in all respects with license BLH-830909AB, except for the channel as specified above and a license application (FCC Form 302) is filed within 10 days of commencement of program tests.

9. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the license of Iowa Great Lakes Broadcasting Company, Inc., for Station KIGL(FM), Spencer, Iowa, IS MODIFIED to specify operation on Channel 285C3, in lieu of Channel 285A, subject to the following conditions:

[3] The coordinates for Channel 285C3 at Spencer are 43-17-45 North Latitude and 95-10-30 West Longitude.

[4] The coordinates for Channel 268A at St. James are 44-03-15 North Latitude and 94-39-40 West Longitude.

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301).

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental assessment pursuant to Section 1.1307 of the Commission's Rules.

10. IT IS FURTHER ORDERED, That the Secretary shall send a copy of this *Report and Order* by Certified Mail, Return Receipt Requested, to the following licensees, as follows: Rogers Broadcasting, Inc., P.O. Box 465, St. James, MN 56081 (licensee of Station KXAX), and Northwest Iowa Broadcasting Corp., P.O. Box 1037, Storm Lake, IA 50588 (licensee of Station KAYL-FM).

11. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

12. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 418-2180.

FEDERAL COMMUNICATIONS COMMISSION

John A Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-459

In the Matter of

Amendment of Section 73.202(b),	RM-7009
Table of Allotments,	RM-7260
FM Broadcast Stations.	RM-7261
(Bay City, Brenham, Cameron,	RM-7263
Centerville, Edna, Ganado, Giddings,	RM-7264
Harker Heights, Hearne, *LaGrange*,	
Matagorda, New Ulm, Point Comfort,	
Rollingwood, Rosenberg, and	
Seadrift, Texas)	

MEMORANDUM OPINION AND ORDER
(Proceeding Terminated)

Adopted: March 8, 1995; Released: March 28, 1995

By the Commission:

1. The Commission has before it the Application for Review filed by Fayette Broadcasting Corporation ("Fayette Broadcasting"), licensee of Station KBUK, Channel 285A, LaGrange, Texas, directed to an earlier *Memorandum Opinion and Order* in this proceeding, 9 FCC Rcd 130 (1993). For the reasons discussed below, we deny the Application for Review.

BACKGROUND

2. At the request of Radio Lee County, the *Notice of Proposed Rule Making and Order to Show Cause* in this proceeding proposed the substitution of Channel 268C1 for Channel 268C2 at Giddings, Texas, and modification of the license of Station KOKE, Channel 268C2, Giddings, to specify operation on Channel 268C1, 4 FCC Rcd 7586 (1989). In the *Report and Order*, the staff upgraded Station KOKE to specify operation on Channel 268C1, 8 FCC Rcd 1552 (1993), and took a number of related actions, including denying a proposal by Fayette Broadcasting to substitute Channel 285C2 for Channel 285A and reallot the channel from LaGrange to Rollingwood, Texas. The staff determined that reallotment of a channel to a community located within the Austin Urbanized Area was not warranted at the expense of the only FM station licensed to LaGrange. In the *Memorandum Opinion and Order*, the staff denied the Fayette Broadcasting Petition for Reconsideration directed against that denial of its proposed reallotment. Fayette Broadcasting then filed the instant Application for Review directed to the denial of its Petition for Reconsideration.

3. In support of its Application for Review, Fayette Broadcasting sets forth four arguments. First, Fayette Broadcasting contends that the staff derived the wrong conclusion when it compared the local transmission and available reception services to LaGrange and Rollingwood, and "minimized the significance" of the continuing local service to LaGrange by commonly owned AM Station KVLG. Second, Fayette Broadcasting argues that the staff "erroneously downplayed" the resulting service gain from the proposed reallotment and the absence of any engineering alternatives to improve the facilities of Station KBUK. Third, Fayette Broadcasting contends that the fact that Rollingwood is located within the Austin Urbanized Area should not be dispositive of its reallotment proposal. Finally, Fayette Broadcasting states that the staff erred in refusing to consider the "financial straits" of Station KBUK as a public interest consideration in evaluating the proposed reallotment. We will consider these arguments *seriatim*.

DISCUSSION

4. The proposed reallotment from LaGrange to Rollingwood was filed pursuant to the provisions of Section 1.420(i) of our Rules, which provide for the reallotment of the channel to a new community and modification of a station's license or construction permit to reflect the new community, without competition from other applicants for the new allotment. *See Report and Order* in MM Docket No. 88-526, (*"Community of License"*), 4 FCC Rcd 4870 (1989); *Memorandum Opinion and Order* in MM Docket No. 88-526, (*"Reconsideration Order"*), 5 FCC Rcd 7094 (1990). Under *Community of License* and the subsequent *Reconsideration Order*, the reallotment to the new community must serve our allotment policies and priorities.[1] As such, it is necessary for us to evaluate the comparative merits of retaining Channel 285A in LaGrange versus a Channel 285C2 allotment in Rollingwood. In making this evaluation, we consider the "totality of factors" as suggested by Fayette Broadcasting.

5. It is necessary for us to first compare the availability of service, both service from stations licensed to the specific communities involved in this case ("local transmission service") and service received in and around those communities ("reception services"). Such a comparison favors retaining the channel in LaGrange. As stated in the *Memorandum Opinion and Order*, 250-watt daytime-only Station KVLG would remain licensed to LaGrange while fulltime AM Station KFGI is already licensed to Rollingwood. In regard to available reception services, we agree with Fayette Broadcasting that neither LaGrange nor Rollingwood is underserved. The entire Station KBUK service area receives at least five other aural services. We consider this to be adequate service. *See Family Broadcasting Group*, 53 RR 2d 662, 669 (Rev. Bd. 1983), *rev. denied*, FCC 83-559 (November 29, 1983). Rollingwood and the area that would receive service from a Class C2 facility receives service from approximately 20 stations. The re-

[1] In evaluating competing FM allotment proposals, the FM priorities are (1) first aural service, (2) second aural service, (3) first local service, and (4) other public interest matters. Coequal weight is given to priorities (2) and (3). *See Second Report and Order* in BC Docket No. 80-130 (*"FM Priorities"*), 90 FCC 2d 88 (1982).

spective populations of LaGrange and Rollingwood are 3,768 and 1,388 persons. Since both communities have a local AM transmission service, under our policies and consistent staff practices, if we were choosing where a new allotment should be made, we would choose the larger community of LaGrange. *Three Oaks and Bridgman, Michigan*, 5 FCC Rcd 1004 (MM Bur. 1990). Our preference in favor of LaGrange is reinforced by the fact that Fayette Broadcasting proposes to remove a service from LaGrange, thus causing the additional public interest detriment of disruption of existing service (*See Reconsideration Order, supra*, at 7097), and by the significantly greater number of reception services available to Rollingwood and the proposed service area.

6. With respect to the second argument advanced by Fayette Broadcasting, that the staff improperly downplayed the service gains from the reallotment, we are well aware that the proposed Channel 285C2 allotment to Rollingwood would result in a net service gain of 712,919 persons. However, this population gain is not dispositive of this matter, since it is attributable to the fact that Station KBUK is currently licensed to a rural community of 3,768 persons, while Rollingwood, with a population of 1,388 persons, is located within the Austin Urbanized Area. In considering the totality of the factors, it is our view that we would be allotting a 20th aural service to the Austin Urbanized Area at the expense of the only local fulltime service licensed to LaGrange. The proposed reallotment would leave LaGrange with only AM Station KVLG. In its Application for Review, Fayette Broadcasting argues that to the extent the staff relied on the daytime only status of Station KVLG, its actions were improper. Fayette Broadcasting states that its commonly owned AM Station KVLG intends to commence operation pursuant to a 10.8-watt nighttime authorization and is currently operating during early morning hours in accordance with its 32-watt presunrise service authorization. We note that Fayette Broadcasting does not explain why these facts were not raised when the Bureau was first considering this case. *See* 47 CFR § 1.115(c). Even if they are considered, however, it is our view that these operations do not warrant treating Station KVLG as a fulltime station, nor do they negate the loss of Station KVLG as the only full power nighttime service licensed to LaGrange. Station KVLG's nighttime operations provide minimal coverage, and are secondary and permissive in nature. As such, they can be preempted at any time, and the licensee may cease such operations at will and without notification to the Commission. In this regard, we note such operations do not remove a station from daytime-only status under our Rules. *See* 47 C.F.R. § 73.99. We do not believe that this loss of the second local and only local fulltime service is negated by the continuing service of Station KVLG, the fact that the Station KBUK service area would continue to receive at least five services, or the fact that the proposed reallotment represents a net service gain of 712,919 persons already receiving a plethora of service.

7. We also recognize that in the *Reconsideration Order* the Commission clarified that, unless a high burden is met, change of community proposals would not be granted if this would result in the removal of a community's sole local transmission service. The Commission further provided that, for purposes of determining sole local transmission service, a daytime only AM station would be considered service. *See Reconsideration Order, supra* at 7097. We do not believe that this language is inconsistent with our action in this case. Rather, this language merely sets forth a threshold requirement that a change of community proposal will not ordinarily be granted if the community's sole local transmission service is removed. Such a requirement does not, however, preclude the Commission from also making a comparison under Section 307(b) of the Communications Act of 1934, as amended, to determine whether the station's existing community of license or proposed community of license has a greater need for the station in question. As part of that comparison, we believe that it is relevant to consider under Priority 4 ("other public interest matters") a variety of factors such as the populations of the communities and whether one of the communities would lose its second local and only fulltime radio station. *See Reconsideration Order, supra*, at 7096. Accordingly, in this case, we believe that it is relevant to consider the loss of LaGrange's second local and only fulltime transmission service as one of these comparative factors.

8. Denial of this proposal is also consistent with the staff *Report and Order* in *Scotland Neck and Pinetops, North Carolina* (*"Scotland Neck"*), 7 FCC Rcd 5113 (MM Bur. 1992), cited by Fayette Broadcasting, which is distinguishable on two grounds. In *Scotland Neck*, the staff upgraded Station WWRT, Channel 238A, Scotland Neck, to specify operation on Channel 238C3, and reallotted the channel to Pinetops. In doing so, the staff removed the only fulltime aural service from Scotland Neck and reallotted the channel to Pinetops as a first local service. In contrast, a Rollingwood reallotment proposal would not, under any circumstance, be entitled to a consideration as a first local service because Station KFGI is licensed to Rollingwood. The staff also determined that Pinetops was located 23.3 kilometers (14.5 miles) outside the Rocky Mount Urbanized Area, and should be treated as independent of the Rocky Mount Urbanized Area.

9. Here, in contrast, we believe that considering the fact that Rollingwood is located within the Austin Urbanized Area is both consistent with the suggestion by Fayette Broadcasting that we consider the "totality of the factors," and with our concern expressed in the *Reconsideration Order*, that community of license changes not become a vehicle for clustering stations in urban areas. We believe it reasonable to treat Rollingwood, a community of 1,388 persons located within the Austin Urbanized Area, as part of this Area. This, coupled with the fact that Fayette Broadcasting is proposing a Class C2 FM facility that would provide service to the Austin Urbanized Area, reinforces our view that we would be allotting a 20th aural service to the Austin Urbanized Area at the expense of the only FM station licensed to LaGrange.

10. Finally, we recognize that there may be, in fact, no alternative available to Fayette Broadcasting to either upgrade or relocate to an area with a larger economic or population base.[2] Clearly, such an upgrade or reallotment could provide significant economic benefits to Fayette

[2] As noted by Fayette Broadcasting, Commission technical requirements currently preclude upgrading Station KBUK to Class C2 status at LaGrange. *See* Section 73.207(b) of the Rules. In its proposal, Fayette Broadcasting also states that it is "not a viable option" to relocate the Station KBUK transmitter in order to increase power from three kilowatts to six kilowatts

Broadcasting and Station KBUK. However, any such proposal must comply with our technical requirements as well as our allotment priorities and policies. As discussed above, we do not believe that, on balance, removal of the only local FM service from LaGrange and reallotment to a community within the Austin Urbanized Area serves our allotment policies or the public interest.

11. We also note that the argument advanced by Fayette Broadcasting concerning the "financial straits" of Station KBUK does not warrant favorable action on its proposed reallotment. There is no provision in our allotment policies, as defined in *Community of License, supra,* to have alleged financial hardship considered in determining whether a particular reallotment proposal would result in a preferential arrangement of allotments in furtherance of Section 307(b) of the Communications Act.[3] To the extent Fayette Broadcasting believes that financial hardship should be an appropriate consideration in a Section 307(b) context with respect to a reallotment proposal, we believe that any new criterion, such as degree of hardship and any other relevant consideration, should be established in the course of a rulemaking proceeding. *Cf. Second Report and Order* in MM Docket No. 87-7, 4 FCC Rcd 1741 (1989); *Memorandum Opinion and Order* in MM Docket No. 87-7, 4 FCC Rcd 6489 (1989). This is particularly true because the generally greater advertising revenues available in more urbanized areas would, were we to adopt a policy of considering financial hardship, consistently provide a rationale for moving stations to such areas. Given the concern underlying Section 307(b) of the Act, that service not be clustered in urban areas to the detriment of more rural areas, we would be particularly concerned that any consideration of financial hardship not promote undesirable results.

12. Accordingly, IT IS ORDERED, That the aforementioned Application for Review filed by Fayette Broadcasting Corporation IS DENIED.

13. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

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while remaining licensed to LaGrange.

[3] Section 307(b) requires us to make a "fair, efficient, and equitable distribution of radio facilities" to the various states and communities. In meeting this statutory objective, our goals are to provide service to all areas of the country, provide as many program choices to as many listeners as possible, and provide service of a local origin to as many communities as possible. *FM Priorities, supra,* at 89.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Petition for Relief of

HARRY TOOTLE dba TOOTLEVISION CSR-4129-L

vs.

COMMUNITY CABLE TV/ PRIME CABLE OF NEVADA et al.

For Leased Access Channels

MEMORANDUM OPINION AND ORDER

Adopted: February 14, 1995; Released: February 16, 1995

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. On September 8. 1993 Harry Tootle d/b/a Tootlevision ("Tootlevision") filed a Petition for Relief pursuant to the Section 76.975 of the Commission's rules alleging that Community Cable TV/Prime Cable of Nevada ("Prime Cable") was in violation of various sections of the Federal Communication Commission's leased access and program carriage rules as well as certain other statutory and regulatory provisions.[1] On October 22, 1993, Prime Cable filed an opposition to Tootlevision's petition. Prime Cable asserts that the petition is defective as a matter of law and that it seeks relief the Commission has no authority to grant. Prime Cable also questions the intent of Tootlevision in filing the Petition.

2. On November 11, 1993, Tootlevision filed an "Addendum" to its petition reiterating an allegation from its original petition that Prime Cable has violated the Commission's leased access rules by refusing to offer leased access channels on other than a full time/full channel basis, by quoting rates for channels on a full time/full channel basis only, and by imposing certain technical requirements that are excessive. On December 10, 1993, Prime Cable filed a response to the addendum asserting that it had fulfilled its obligation under the leased access rules.

II. BACKGROUND

3. In 1984, Congress amended the Communications Act of 1934 to add, among other things, a requirement that cable operators with 36 or more activated channels set aside part of their channel capacity for use by programmers that are not affiliated with them.[2] This requirement is called the commercial leased access or "leased access" requirement. The Cable Television Consumer Protection and Competition Act of 1992 (the "1992 Cable Act") revisited the leased access requirement and directed the Commission to establish, among other things, rules for determining maximum reasonable rates for leased access.[3] Pursuant to that Congressional directive, the Commission established rules applicable to leased access channel rates in its May 3, 1993 order for *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992;* Rate Regulation MM Docket 92-266, (the *Rate Order),* 8 FCC Rcd 5631 (1993), at ¶ ¶ 531-538. *See also,* 47 C.F.R. § 76.970.

4. In the *Rate Order,* the Commission developed procedures for cable operators to follow in determining the maximum reasonable rate that a cable operator may charge any nonaffiliated programmer for leased access.[4] Under the Commission's rules, maximum reasonable rates are to be developed by cable operators for three categories of programs.[5] The three program categories are: (1) pay-per-event or pay-per-channel programs; (2) programming where more than fifty percent of the capacity is used to sell products to subscribers; and (3) all other programs. The highest implicit net fee that a cable operator charges any nonaffiliated non-leased access programmer within each category is to be calculated, using procedures described in our rules, on a monthly basis. The highest implicit net fee thus determined for each of the three program categories becomes the maximum monthly rate that the operator may charge a programmer for leased access for that program category.[6]

5. The Commission determined that certain issues associated with obtaining leased access should be left for negotiations between the parties. For example, in establishing the maximum reasonable rates for leased access, the Commission noted that lower rates could be negotiated.[7] With respect to channel placement and tier access, the Commission also stated that this should be left in the first instance to negotiation between the parties.[8] The Commission further noted its belief that cable operators should accommodate all leases, *i.e.,* leasing an hour on a regular leased channel, leasing a whole channel, or leasing for use as a subscription service.[9] The Commission's rules provide some guidance for establishing rates for these shorter lease periods, stating that maximum rates can be calculated by prorating the monthly maximum rate.[10]

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[1] Tootlevision's petition also names Barbara Greenspun, Brian Greenspun, Harris Bass, Steve Schorr and Rudolph H. Green, identified as employees of Prime Cable, individually in the caption as respondents. None of those individuals has filed a response. Inasmuch as the petition seeks relief only with respect to Prime Cable, the petition will be dismissed with respect to these individuals. Moreover, the Commission's leased access dispute resolution rules provide for the granting of relief with respect to cable operators only, and not with respect to individuals or entities which are not cable operators. *See* 47 C.F.R. § 76.975.

[2] Communications Act of 1934, as amended, § 612(b)(1), 47 U.S.C. § 532(b)(1)(1992). The amount of channel capacity an operator must set aside is based on a system's activated channel capacity.

[3] Communications Act of 1934, § 612(c)(4)(A) & (B), 47 U.S.C. § 532(c)(4)(A) & (B) (1992).

[4] 47 C.F.R § 76.970(b)(c) and (d).

[5] 47 C.F.R. § 76.970(f).

[6] 47 C.F.R. § 76.970(d).

[7] *Rate Order,* ¶ 519.

[8] *Rate Order,* ¶ 498.

[9] *Rate Order,* ¶ 498, n.1277.

[10] 47 C.F.R. § 76.970(d).

6. Pursuant to the 1992 Cable Act, the Commission in the *Rate Order* developed an administrative dispute resolution process for the purpose of expediting resolution of disputes concerning leased access requirements. Under this procedure, any person aggrieved by the failure or refusal of a cable operator to make leased access capacity available or to charge rates for such capacity as mandated by the 1992 Cable Act and Commission's rules may file a petition for relief with the Commission.[11]

III. THE PLEADINGS

7. In its petition, Tootlevision, an operator of a low-power UHF TV station serving the Las Vegas, Nevada area, alleges that Prime Cable has caused Tootlevision financial hardship and mental anguish and has failed to provide leased access channels on other than a full channel/full time basis, in violation of Sections 76.970(d) & (d), 76.971(a)(1)(iii), and 76.977(a) of the Commission's rules.[12] Violations of 47 U.S.C. §§ 531, 543(b)(7)(ii), and 548(a) are also alleged.

8. In support of these allegations, Tootlevision asserts that it has tried without success to negotiate an arrangement for carriage of programming on the cable system of Prime Cable, which serves Las Vegas, Nevada and adjacent areas. Enclosed with the petition is correspondence between Tootlevision and Prime Cable during these negotiating efforts. This correspondence shows that Tootlevision initially inquired about arrangements for carriage as a local broadcast station. Prime Cable responded by asserting that the low power station did not qualify for must carry under the Commission's must carry rules.[13] Tootlevision also inquired about a leased access channel rate, which elicited a quotation by Prime Cable of $85,000 per month.[14] When Tootlevision requested "a schedule of rates for each classification,"[15] Prime Cable responded by again quoting the $85,000 per month rate[16] and stating that it "has no obligation to lease capacity on less than a full channel/full time basis." Following a further inquiry about pricing, terms and conditions for the three categories of channels set out in the rules,[17] Prime Cable reiterated that it "will not lease time on less that a full month basis" and submitted a proposed channel lease agreement along with the following monthly rate quotes:

Pay-per-program or pay channels	$ 182,083.44
Direct sales/home shopping channels	14,108.64 plus 15% of gross revenues
All other channels	78,594.12 per month[18]

9. Prime Cable argues in its Opposition that the petition is defective and should be dismissed, because it does not show that Prime Cable has failed or refused to make leased access channels available in violation of the Commission's rules. It also seeks dismissal because the petition was filed shortly after the leased access rules became effective on September 1, 1993, and asserts that to find otherwise would imply an obligation to comply with the leased access rules before they became effective. The opposition also asserts that Prime Cable has not violated any of the statutory or regulatory provisions cited.

10. In an addendum to the petition, Tootlevision asserts that Prime Cable's refusal to quote rates for channels on other than a full time basis has placed a prohibitive financial barrier on distribution of its programming. It claims that the prices quoted for full time/full channels and the technical requirements for connection are excessive, in violation of the Commission's leased access rules.[19] In a response to the addendum, Prime Cable asserts that it has fulfilled its obligations under the 1992 Cable Act and the leased access rules to provide reasonable terms and conditions for use of leased access capacity.

IV. DISCUSSION

11. We will treat Tootlevision's petition and the addendum to that petition as raising essentially two issues. The first issue is whether Prime Cable has an obligation under the statute and our leased access rules to provide leased access capacity on less than a full channel/full time basis. Since this issue is answered affirmatively, a second issue concerns the establishment of reasonable part time rates to be applied for part time channels. In this order, the specific issues are resolved on the record consistent with the current rules applicable to leased access channels.

A. The Obligation to Offer Less Than Full Time Channels.

12. We address, first, whether cable operators have an obligation to provide leased access channels on a less than full channel/full time basis. As noted above, provisions of the 1984 and 1992 Cable Acts have established a requirement that cable operators set aside part of their channel capacity for use by programmers not affiliated with them.[20] The Commission's rules implementing those statutory pro-

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[11] 47 C.F.R. § 76.975(b).

[12] 47 C.F.R. §§ 76.970(d) & (e), 76.971(a)(1)(iii), and 76.977(a).

[13] *See* Tootlevision's letters to Prime Cable, dated July 22 and August 9, 1993, and Prime Cable's letter to Tootlevision dated August 10, 1993. Since the LPTV station serves a community, Las Vegas, NV, that is larger than 35,000 in population and served by full power television stations, it does not qualify for "must carry" on Prime Cable's system. *See* 47 U.S.C. § 534(h)(2)(A)-(F).

[14] *See* Prime Cable's letter to Tootlevision dated August 10, 1993.

[15] *See* Tootlevision's letter to Prime Cable dated August 1, 1993 at p. 2. In this letter Tootlevision confirmed the availability of certain program delivery equipment, and asked Prime Cable for a phone number of a Prime Cable contact person and for a copy of its billing and collection policy, and stated an interest in "starting out with 8 pm to 10 pm, seven days a week."

[16] *See* letter from Prime Cable to Tootlevision dated August 10, 1993. The $85,000 rate was quoted "for programming that does not fall into the categories of shopping channels' or premium services' such as pay-per-view."

[17] *See* letter from Tootlevision to Prime Cable dated September 6, 1993.

[18] Letter from Prime Cable to Tootlevision dated September 17, 1993.

[19] The Addendum makes references to Sections 76.970(e), 76.971(2) (b) & (c) and 76.975 (e) of the Rules.

[20] *See* 47 U.S.C.§ 532.

visions include procedures to be followed by cable operators for determination of the maximum monthly rates for those channels, and require cable operators to maintain for Commission inspection sufficient supporting documentation for those rates. Under these rules, cable operators must establish and make available on request by prospective leased access programmers a schedule of maximum monthly leased access rates for three separate categories of channels[21]

13. An essential purpose of these leased access provisions is the promotion of competition in the delivery of diverse sources of video programming and the widest possible diversity of information sources, consistent with the growth and development of cable systems.[22] The Commission addressed these goals when it developed the leased access rules. In its *Rate Order* the Commission indicated an awareness that leasing issues may need to be addressed in various ways as required by the kinds of services involved.[23] It declined to undertake a comprehensive resolution of all such issues that may be presented, stating that many of such issues "can better be resolved in a more specific concrete factual setting."[24] It observed further that the legislative history of the 1992 Act shows that Congress intended leased access to provide programmers a genuine outlet for their product, and expressed a belief that cable operators should be required to accommodate various leasing arrangements in a reasonable manner.[25]

14. Consistent with these goals, the Commision, in adopting leased access rules designed to implement these Congressional concerns, anticipated a need for channel capacity to be made available in less that full month increments, as indicated by the last sentence of Section 76.790 (d), which states that "Maximum rates for shorter periods can be calculated by prorating the monthly maximum rate."[26] This provision, found in the rule addressing rates, is thus clearly rooted in the Congressional concern for the accommodation of various leasing arrangements on a reasonable basis. Accordingly, we conclude that the leased access statutory provisions of the 1984 and 1992 Cable Acts, and our leased access rules implementing that legislation, require that cable operators accommodate requests for leases of less than full channel/full time access channel capacity on channels required by the statute to be set aside for leased access. Consistent with that requirement, Prime Cable will be ordered to offer part time leased access channel capacity to Tootlevision in increments that will reasonably accommodate Tootlevision's request for part time leased access programming.

B. Part Time Rates for Part Time Channel Capacity.

15. As noted above, Prime Cable provided Tootlevision with a schedule of rates for full time leased access channels for the three categories described in our rules.[27] Tootlevision alleges that the full time rates offered by Prime Cable place prohibitive financial barriers on the distribution of its programming and are excessive. It asserts that Prime Cable has thus failed to provide the price, terms and conditions for carriage of its programs, in violation of Section 76.970 (e) of the rules. It requests that the Commission require Prime Cable to substantiate the prices quoted by submitting to the Commission for inspection additional information and documentation in accordance with Section 76.975 (e) of the rules.[28] Prime Cable, maintaining its position that it has no obligation to lease channel capacity on other than a full time basis, has offered no rates or schedule of rates applicable to the part time channel capacity Tootlevision desires to lease.[29] Prime Cable asserts that its provision of rates for full time channels fulfills its obligations under our leased access rules.

16. Section 76.970(e) of the rule provides that on request, a cable operator must provide a schedule of leased access rates to prospective leased access programmers. It further provides that cable operators must maintain for Commission inspection sufficient supporting documentation to justify the scheduled rates, including contracts, calculations and adjustments supporting those rates. Although Prime Cable has provided a schedule of rates applicable to its full time leased access channels, it has provided no information or calculations on which the Commission may base a determination of the reasonableness of those rates. In order to make such a determination, Prime Cable will be required to provide to the Commission for inspection, pursuant to Section 76.970(e) of the rules, sufficient supporting documentation to justify the scheduled rates, including contracts and calculation of the implicit net fees, and justifications for any adjustments made.

17. As noted, Prime Cable has not provided rates or a schedule of rates for part time access leases. Consistent with the conclusion herein that Prime Cable must offer less than full time leased access channels, Prime Cable will be required to establish a schedule of rates applicable to part time use of leased access channels. The schedule or rate card for part time use shall include rates for different times of day pursuant to which, if all times were used, the sum of the part time charges for any single leased access channel would not exceed its maximum monthly rate for a leased access channel calculated in accordance with Section 76.970 or our rules.[30] Such rate structure shall be reasonably reflective of empirical time of day values and should

[21] 47 C.F.R. § 76.970.

[22] 47 U.S.C. Section 612 (a).

[23] Examples of kinds of services the Commission anticipated being involved included pay channels, advertiser supported channels intended for wide distribution, channels for narrow commercial purposes not of interest to large numbers of subscribers and channels used for a single program or series of programs. *See* Rate Order, ¶ 491.

[24] *Id.*

[25] *See, Rate Order*, at ¶ 498 and at n.1277. The Commission further stated in the *Rate Order* that, while it was declining to establish guidelines regarding the time that channel capacity must be made available, "[g]enerally, leased access programmers should have access to channel capacity at any time of the day, up to and including the full programming day..." (May 1993 Order, ¶ 498, at n.1283).

[26] 47 C.F.R. § 76.970(d).

[27] *See* 47 C.F.R. § 76.970(f).

[28] *See* Addendum.

[29] Tootlevision requested rates for "a 1 hour weekly program on Sundays 10 AM and 8 PM (on channel 12)." *See* Tootlevision letter to Prime Cable dated August 9, 1993. The letter may not express clearly whether this request relates to the must carry request or for leased access channel capacity. Since must carry involves carriage of a station's entire program, we construe this as a request for leased access channel capacity.

[30] *See* 47 C.F.R. § 76.970(d).

not serve merely as a mechanism to retard use. In order to monitor compliance with this requirement, Prime Cable will also be required to maintain on file adequate records, consistent with Section 76.970(e) of our rules, which show the total monthly revenues derived from all part time users of each leased access channel, the maximum monthly charge for a full leased access channel, and the documentation and calculations used for deriving the maximum monthly charge in accordance with Section 76.970 of the rules.[31] We reserve the right to review Prime Cable's part time rates to assure that they both encourage use and provide reasonable and adequate compensation within the "implicit fee" structure. The issue addressed here is among significant issues now before the Commission on reconsideration.[32] In this order, we resolve the issues presented in accordance with the current rules applicable to leased access channels.

C. Miscellaneous Other Matters

18. Other miscellaneous matters have been raised by the petition. For example, it is alleged that Prime Cable may be exercising control over a government access channel in violation of Section 611 of the Communications Act, as amended.[33] The petition contains no specific information that supports this allegation, and therefore we will not consider this issue. The petition further asserts that a PEG channel is being carried by Prime Cable on channel 31 and not in the basic tier, in violation of Section 623(b)(7)(A)(ii) of the Act.[34] Prime Cable argues in response that the Commission has no jurisdiction over content of a cable system's basic tier unless the local franchise authority has requested the Commission to exercise such jurisdiction, which has not occurred here. The record before us contains no information about the make-up of Prime Cable's basic tier or even whether channel 31 is part of its basic tier, nor does it show whether Prime Cable's franchise requires carriage of PEG channels.[35] We decline to address this issue in this context. It is also alleged that Prime Cable's actions have impeded petitioner's efforts to increase the availability of cable and satellite programming in rural and other areas not currently able to receive such programming, in violation of Section 628(a) of the Act.[36] Prime Cable asserts that petitioner has not shown that he is a multichannel video programming distributor, and that he therefore has no standing to seek relief under Section 628. We believe this order grants the essential elements of relief that the petitioner seeks, namely the requirement that PrimeCable offer it part time leased access channel capacity pursuant to part time rates. Therefore, we need not consider in this order whether petitioner may have standing under Section 628 of the Act.[37]

19. Finally, the petition asserts that Prime Cable has imposed certain technical standards that are excessive and in violation of Section 76.971 (b) of the rules. In view of the relief granted by this order, we believe it sufficient at this time to remind both parties that Section 76.971 (b) provides that cable operators may not apply program production standards to leased access channels that are higher than those applied to PEG channels.[38] These standards should be readily ascertainable, as they should be applied by Prime Cable to the PEG channels currently on its system. Accordingly, we expect that Prime Cable will apply those standards in its carriage of Tootlevision's programming, as required by that rule.

V. ORDERING CLAUSES

20. For the foregoing reasons, IT IS ORDERED that the Petition for Relief of Harry Tootle d/b/a as Tootlevision is GRANTED in PART, as described above, and in all other respects, is DENIED.

21. IT IS FURTHER ORDERED that COMMUNITY CABLE TV/ PRIME CABLE OF NEVADA (herein "Prime Cable"), within 20 days from the effective date of this order, shall file with the Commission supporting contracts in effect for the calendar year prior to December, 1993, the number of subscribers for the Las Vegas, Nevada system as of December 31, 1993, and any other relevant documentation, to justify the calculation of the maximum monthly implicit net fee for leased access as provided Section 76. 970(e) of our rules.

22. IT IS FURTHER ORDERED that Prime Cable, within 20 days from the effective date of this order, shall establish a schedule of rates, or rate card for different times of day pursuant to which, if all times were used, the sum of the part time charges for any single leased access channel would not exceed its maximum monthly rate for a leased access channel calculated in accordance with Section 76.970 of our rules.

23. IT IS FURTHER ORDERED that Prime Cable shall maintain on file adequate records, consistent with Section 76.970(e) of our rules, which show the total monthly revenues derived from part time users of each leased access channel, together with the maximum monthly charge for a full leased access channel and the documentation and calculations used for deriving the maximum monthly charge in accordance with Section 76.970 of the rules.

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[31] The requirement that Prime Cable establish a schedule of part time leased access rates and that it maintain supporting records for inspection is consistent with requirements we have imposed on cable operators in two other proceedings in which the matter of part time leased access rates were condidered. *See* Memorandum Opinion and Order, CSR-4178-L (DA 94-1563), released December 27, 1994, and Memorandum Opinion and Order, CSR-4186-L (DA 94-1564), released December 27, 1994.

[32] *See* Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, MM Docket 92-266, (petition for reconsideration pending.)

[33] *See* 47 U.S.C. § 531(e), (cable operators may not exercise editorial control over public, educational, or governmental ("PEG") use of leased access channels).

[34] *See* 47 U.S.C. § 543(b)(7)(ii) (any PEG access programming required by the franchise of the cable system to be provided to subscribers must be carried in the basic tier).

[35] *See* 47 U.S.C. § 543(b)(7)(ii).

[36] *See* 47 U.S.C. § 548(a).

[37] Tootlevision cannot be faulted nor its petition dismissed because the petition was filed only a few days after the leased access rules became effective on September 1, 1993, as suggested by Prime Cable. This order addresses the requirements of the leased access rules forward from the effective date of those rules and does not purport to apply any of those requirements retroactively.

[38] *See*, 47 U.S.C.A. Section 76.971(b)

24. IT IS FURTHER ORDERED that the petition is DISMISSED with respect to Barbara Greenspun, Brian Greenspun, Harris Bass, Steve Schorr and Rudolph H. Green individually.

25. This action is taken pursuant to authority delegated by Section 0.321 of the Commission's rules, 47 C.F.R. § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Southwestern Bell Telephone Company Revisions to Tariff F.C.C. No. 73 — Transmittal Nos. 2414 and 2428

ORDER

Adopted: February 15, 1995; Released: February 15, 1995

By the Acting Chief, Tariff Division, Common Carrier Bureau:

1. On December 23, 1994, Southwestern Bell Telephone Company (SWBT) filed Transmittal No. 2414 to revise its Tariff F.C.C. No. 73. In this filing, SWBT proposes to modify its current jurisdictional reporting requirements for Percentage of Interstate Usage (PIU) to include 700 access service. Description and Justification (D&J) at 1-1. Presently, SWBT develops a PIU for 700 originating traffic based on Feature Group C (FGC), Basic Serving Arrangement-C (BSA-C), Feature Group D (FGD), or Basic Serving Arrangement-D (BSA-D) call detail. D&J at 1-2. This filing would require customers that use FGC/BSA-C and/or FGD/BSA-D switched access service to report a separate PIU for the transport of originating 700 service traffic, enabling SWBT to bill based on an individual customer's actual traffic pattern in each jurisdiction. *Id.*

2. In the event a customer does not provide the required PIU reports for 700 service, SWBT's Transmittal No. 2414 establishes a default PIU of 0 percent interstate use, authorizing SWBT to bill 100 percent of the customer's 700 traffic as intrastate. D&J at 1-2. Pursuant to the modifications proposed in Transmittal No. 2414, customers in Arkansas, Kansas, Missouri and Oklahoma must provide SWBT with quarterly PIU reports; customers in Texas must provide SWBT with PIU reports both quarterly and annually. *Id.* Transmittal No. 2414 is scheduled to become effective on February 16, 1995.

3. MCI Telecommunications Corporation (MCI) filed a petition to reject Transmittal No. 2414 on January 9, 1995 to which SWBT replied on January 20.[1] In its petition, MCI contends that SWBT's proposal to set the default PIU level at 0 percent for 700 service is arbitrary, unjustifiably punitive, and discriminatory. MCI Petition at 2. According to MCI, SWBT presents no legitimate argument to support the 0 percent interstate default level because 700 services can be either interstate or intrastate in nature. *Id.* To ensure that SWBT's default PIU more accurately reflects actual 700 traffic patterns, MCI recommends that SWBT adopt for 700 service a default PIU level of 50 percent interstate and 50 percent intrastate comparable to the default PIU SWBT has implemented for other services. *Id.*

4. In its reply, SWBT maintains that a 0 percent default PIU is reasonable, since many interexchange carriers (IXCs), including MCI, currently utilize 700 service solely for transport of intrastate toll calls within a given numbering plan area. Reply at 2. SWBT further argues that its 0 percent default PIU for 700 access service is not discriminatory because it is based on SWBT's estimation of actual 700 service traffic patterns. *Id.* at 4. SWBT concedes that 83 percent of its total 700 access service is intraLATA toll, while AT&T Communications and Sprint Communications Company, L.P., who do not offer 700 service as an alternative to 1+ intraLATA toll dialing, comprise the remaining 17 percent of SWBT's 700 access service. *Id.* at 3-4. Finally, SWBT maintains that its default PIU is not discriminatory because MCI can avoid the 0 percent default simply by submitting PIU reports to represent its actual 700 service traffic. *Id.* at 4.

5. On February 13, 1995, SWBT filed Transmittal No. 2428 to revise its proposed PIU default for 700 access service from 0 percent interstate to 17 percent interstate. According to SWBT, the revised PIU default is based on SWBT's assessment that 17 percent of the traffic in its region can be attributed to IXCs that do not offer 700 service as an alternative to intraLATA toll service. Transmittal No. 2428 is also scheduled to become effective on February 16, 1995.

6. The Tariff Division has reviewed Southwestern Bell Telephone Company Transmittal Nos. 2414 and 2428. We conclude that no compelling argument has been presented that the tariff revisions are patently unlawful so as to require rejection.

7. Accordingly, IT IS ORDERED that the petition to reject Southwestern Bell Telephone Company's revisions to Tariff F.C.C. No. 73, Transmittal No. 2414, filed by MCI Telecommunications Corporation, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Geraldine A. Matise
Acting Chief, Tariff Division
Common Carrier Bureau

[1] On February 7, 1995, the Missouri Public Service Commission (MPSC) submitted a letter in support of SWBT's 0 percent default PIU for 700 access service. The MPSC asserts that a 0 percent default PIU would provide adequate incentive for interexchange carriers to report accurately 700 traffic information. Letter to Geraldine A. Matise, Acting Chief, Tariff Division, FCC from Al Mueller, Chairman, Missouri Public Service Commission.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TCI CABLEVISION OF
GALESBURG, INC.,

Appeal of Enforcement of Local Rate
Order of the City of Galesburg, Illinois.

ORDER

Adopted: February 15, 1995; Released: February 16, 1995

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. On July 20, 1994, TCI Cablevision of Galesburg, Inc. ("TCI"), the franchisee in the above-referenced matter, filed an appeal of a local rate order. The local rate order was adopted on June 20, 1994 by TCI's franchising authority, the City of Galesburg, Illinois ("City"). The City opposes TCI's appeal.[1] The Rate Order established a new regulated rate schedule for TCI's basic service tier rates and associated equipment charges.[2] Specifically, the City's Rate Order requires TCI to implement certain rate reductions and to issue refunds to subscribers for overcharges levied during the period from September 1, 1993 to July 14, 1994.

2. Under our rules, rate orders made by local franchising authorities may be appealed to the Commission.[3] In ruling on appeals of local rate orders, the Commission will not conduct a *de novo* review, but instead will sustain the franchising authority's decision as long as there is a reasonable basis for that decision.[4] Therefore, the Commission will reverse a franchising authority's decision only if it determines that the franchising authority acted unreasonably in applying the Commission's rules in rendering its local rate order.[5] If the Commission reverses a franchising authority's decision, it will not substitute its own decision but instead will remand the issue to the franchising authority with instructions to resolve the case consistent with the Commission's decision on appeal.[6]

3. In this appeal, the issues TCI raises all involve calculations in FCC Form 393 and include allegations that: (1) the City refused to allow TCI to correct errors made by TCI on its FCC Form 393 which were first discovered and brought to the City's attention on the day the rate order was issued; (2) and that the City used an incorrect figure for total labor hours in calculating TCI's Hourly Service Charge ("HSC"). We consider each of these issues in turn.

II. DISCUSSION

4. FCC Form 393 is the official form used by regulators to determine whether an operator's regulated rates for programming, equipment and installations were reasonable during the time period from September 1, 1993 until May 14, 1994.[7] Form 393 is divided into three separate, but interrelated parts. In Part II, the operator calculates its maximum permitted programming rates, while in Part III, the operator calculates its maximum permitted equipment and installation rates. Part I is a cover sheet that lists the various programming, equipment and installation rates that have been calculated in Parts II and III and compares them to the rates the operator has actually charged during the period of review.

5. The operator's maximum permitted rates are derived by completing Parts II and III of the Form 393, pursuant to which the operator calculates the actual aggregate revenues collected by the operator for regulated programming, equipment and installation, as of the initial date of regulation ("current rate") or as of September 30, 1992.[8] After calculating actual aggregate revenues, the operator converts those revenues to a per-channel rate, and then compares the per-channel figures to the applicable benchmark rate. If an operator's current per-channel rate is below the applicable benchmark rate, then the operator's rate is deemed reasonable, but it must remain at its current level. If its current per-channel rate exceeds the benchmark rate, the operator must then compare its September 30, 1992 per-channel rate to the applicable benchmark rate. If its September 30, 1992 per-channel rate is above the benchmark rate, it must reduce this rate to the benchmark rate or by 10%, whichever reduction is less. The adjusted rate will be its maximum permitted rate for programming. Maximum permitted rates for equipment and installation are based on

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[1] The City filed its opposition on August 11, 1994. TCI filed a reply to the City's opposition on August 25, 1994.

[2] Under the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act") and the Commission's implementing regulations, local franchising authorities may regulate rates for basic cable service and associated equipment. *See* Cable Television Consumer Protection and Competition Act, Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(b), 47 U.S.C. § 543(b).

[3] *See* 47 C.F.R. § 76.944 (1993).

[4] *See* Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, MM Docket No. 92-266, Report and Order and Further Notice of Proposed Rulemaking, 8 FCC Rcd 5631, 5731(1993) (*"Rate Order"*); Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, MM Docket No. 92-266, and Buy-Through Prohibition, MM Docket No. 92-262, Third Order on Reconsideration, 9 FCC Rcd 4316, 4346 (1994) (*"Third Recon. Order"*).

[5] *Id.*

[6] *Id.*

[7] To the extent that an operator has sought to take advantage of the refund deferral period available under the Second Order on Reconsideration, Fourth Report an Order, and Fifth Notice of Proposed Rulemaking in MM Docket 92-266, 9 FCC Rcd 4119, 4183-4185 (1994), the maximum permitted rates determined under Form 393 may also apply from May 15, 1994 until the date that the operator implemented its new rates, as determined under the Form 1200 series.

[8] An operator must calculate its rate in effect on September 30, 1992, only if its current rate is above the benchmark rate. If an operator's current rate is at or below the benchmark rate, it is not required to calculate its September 30, 1992 per-channel rate.

actual cost and are calculated in Part III of the Form 393. Equipment rates are derived from capital and maintenance costs per unit of equipment. Installation rates are derived from the calculation of a hourly service charge and application of that charge to different types of installations. Under our regulations, the maximum permitted rates are deemed to be reasonable, as required by the 1992 Cable Act.[9] Requiring cable operators to set all or some of their rates for programming, equipment or installation below their maximum permitted levels would force them to charge rates at levels below those specifically allowed under our rules.[10]

A. Errors in TCI's FCC Form 393

6. TCI claims it made errors in its FCC Form 393 filed with the City by undercounting the number of units in service, converters and remotes, used in its calculations in Schedule C (Capital Costs of Leased Customer Equipment), Part III of the Form. The total capital costs of customer equipment figure from Schedule C is used in Steps C, D and E to calculate an operator's leased equipment charges. TCI claims it did not discover these alleged errors, however, until the day the City issued its rate order based on TCI's original Form. Due to the lateness of the attempted corrections, the City refused to reconsider them.

7. Under the Commission's rules, cable operators have the burden of proof in demonstrating that the existing or proposed rates for their basic service tier and associated equipment are reasonable.[11] Moreover, operators also have the obligation to timely file their rate justifications with the LFAs.[12] Although we have stated that an operator should have an opportunity to cure any deficiencies in its original filing if its LFA has issued an order to toll the effective date of the proposed rates,[13] we have not required a LFA to consider information submitted by a cable operator after a rate order has been issued.[14] That same reasoning applies to the situation here, where the new information was submitted on the day the City held a public meeting, during which the rate order was issued.

8. In this instance, the City notified TCI that it was certified to regulate rates by letter dated November 3, 1993. The City received TCI's initial Form 393 on December 22, 1993, approximately 20 days late under our rules.[15] By letter dated January 12, 1994, the City notified TCI that the date for issuing a rate order was being extended until April 22, 1994, and that the City would be requesting additional information from TCI. The City's request for additional information concerned both equipment and installation issues. In responding to the equipment issue, TCI reaffirmed the number of its original units in service by including calculations using the same figures contained in its December 22, 1993 submission. On May 10, 1994, the City published a public notice of a May 23, 1994 meeting of its Cable Television Commission at which a proposed rate order was to be discussed. The City sent a copy of its consultant's report and the proposed rate order to TCI on May 12, 1994. At the Cable Television Commission meeting, it was noted that the City Council was scheduled to meet to take action on the proposed rate order on June 20, 1994. Following the Cable Television Commission meeting, TCI indicated that the numbers for converters and remotes in its original submission to the City were incorrect. TCI did not bring the errors regarding its units-in-service calculations to the City's attention until June 20, 1994, the day the rate order was issued and approximately six months after TCI filed its original From 393 with the City.

9. Having not raised the issue with the City before the day the rate order was issued, when the record was open and the City could have considered the issue, TCI is not entitled to have its mistakes corrected by the Commission on appeal. Moreover, TCI has offered no reason why it could not have raised the issue earlier or why the City should be required to reopen the record in its proceeding. Furthermore, TCI provided no evidence to support its claim that the new figures are more accurate than the numbers originally submitted and reaffirmed. To hold otherwise would prevent LFAs from issuing rate orders in a timely fashion, since constant revisions by operators could indefinitely postpone final resolution. Based upon the best available information at the time, the City acted reasonably in issuing its rate order and in declining to consider the new, last-minute information.

B. Hourly Service Charge (HSC)

10. TCI next contends that the City used an incorrect figure for total labor hours (for 1992) in calculating TCI's HSC. The City counters that since TCI was unable to substantiate its assumptions and estimates in calculating total labor hours, the City was forced to recalculate the figure, using installation figures for the six-month period from October 1993 through March 1994, the only actual figures provided by TCI.

11. TCI estimated 1992 total labor hours by multiplying the number of full-time equivalent technical employees by the estimated average annual work hours for such employees, which, TCI claims, resulted in a figure representing the total number of hours worked by its technical employees. TCI then multiplied that number by the estimated percentage of time spent by technical employees on maintenance and installation, which resulted in an estimate of 2323 total labor hours devoted to equipment maintenance and installation. Because the City felt TCI's total labor

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[9] *See* Communications Act, § 623(b), 47 U.S.C. § 543(b).

[10] If a franchising authority required an operator to set its rates for equipment and installations below their maximum permitted levels, the operator could, in effect, be forced to provide equipment and installations at levels below actual cost.

[11] 47 C.F.R. § 76.937 (1993).

[12] 47 C.F.R. § 76.930 (1993) (A cable operator shall file its schedule of rates for the basic service tier and associated equipment with a franchising authority within 30 days of receiving notification from the franchising authority that the franchising authority has been certified by the Commission to regulate rates for the basic service tier.

[13] *Rate Order* at 5709 (. . . To toll the effective date of the proposed rates, the franchising authority must issue a brief order, within the initial 30-day period, explaining that the franchising authority needs additional time to review the proposed rates. During these 90 or 150-day periods, the franchising authority *can* solicit additional information from the cable operator, if necessary, and consider the views of interested parties." (emphasis added)).

[14] New England Cablevision of Massachusetts, Inc. (Amesbury, Essex, Gloucester, Manchester, Merrimac, Rockport, and Salisbury, Massachusetts), DA 94-1607, ¶ ¶ 6-8 (Cable Services Bureau, released December 28, 1994).

[15] *See, supra,* fn.12.

hours figure was low, the City requested information regarding the number of installations TCI performs annually. TCI's response, however, did not provide any 1992 data, nor did it provide average annual installations calculated over a period of years. Instead, the only actual installation numbers provided by TCI were for the six-month period from October 1993 through March 1994. The City then extrapolated estimates from the number of installations which resulted in annual figures for each type of installation. The City then multiplied those figures by the number of hours required for each type of installation, information which was provided by TCI, to arrive at an estimate of 3648 total labor hours.

12. TCI's only objection to the City's actions in this regard is that the City used data from 1993 and 1994 to arrive at total labor hours rather than using data from 1992. TCI cites instructions to Form 393 which state that the total labor hours for maintenance of customer equipment and service installations should come from the "12 month period ending at the close of the most recent accounting period."[16] The City explains, however, that it would have used 1992 data, but the only actual installation data provided by TCI was for a portion of both 1993 and 1994. Had TCI used 1992 data in its original Form 393 or given that data to the City, it is clear from the record below that the City would have used that information in calculating TCI's HSC. Since, however, the only actual installation information provided by TCI was for a portion of both 1993 and 1994, the City used the more recent data. Its actions in that regard were reasonable.

III. ORDERING CLAUSES

13. Accordingly, IT IS ORDERED that TCI's appeal of the City's local rate order IS DENIED.

14. This action is taken by the Chief, Cable Services Bureau, pursuant to authority delegated by § 0.321 of the Commission's rules. 47 C.F.R. § 0.321 (1993).

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

[16] Instructions to FCC Form 393, Part III, Line 4 and Schedule B (August 1993).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	
Century Cable TV	CUID Nos. AL0272, AZ0035,
	CA0021, CA0753, CA0216,
Benchmark Filings	CA0233, CT0112, CT0040,
To Support	CT0041, CT0042, CT0043,
Cable Programming	CT0095, CT0108, CT0109,
Service Prices	CT0111, CT0172, MA0008,
	MA0009, MA0010, NM0008,
	NM0042, NM0019, NM0041,
	NY0256, OH0363, OH0998,
	OH0999, OH0098, PR0004,
	PR0007, WA0304, WA0079,
	WI0357, WV0394, WY0054

MEMORANDUM OPINION AND ORDER

Adopted: February 16, 1995 **Released: February 17, 1995**

By the Deputy Chief, Cable Services Bureau:

I. INTRODUCTION

1. Here we consider complaints about the prices Century Cable TV ("Century") charges for its cable programming service ("CPS") tiers in numerous communities around the country (the "subject communities"). *See* Appendix for a list of the subject communities and the number of basic and CPS channels Century offered in each community both before and after September 1, 1993. Rather than attempting to justify its prices through a benchmark or cost of service showing, Century responded to the complaints by stating that it has no CPS tier in those systems. On January 27, 1995, Century submitted rate cards and channel line-up cards in support of its claim that CPS tiers did not exist as of September 1, 1993, and still do not exist, in any of the subject communities.

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[1] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[2] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[3] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[4]

3. The Commission's original rate regulations took effect on September 1, 1993.[5] The Commission subsequently revised its rate regulations effective May 15, 1994.[6] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[7] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[8] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[9]

II. BACKGROUND

4. The Cable Services Bureau has released orders resolving letters of inquiry ("LOIs") regarding Century's systems in Huntington, West Virginia; Morgantown, West Virginia; Muncie, Indiana; Owensboro, Kentucky; Yuma, Arizona; Brunswick, Georgia; and San Juan, Puerto Rico.[10] Relying on the Commission's *Going Forward Order*,[11] the Bureau's orders addressed the restructured service offerings implemented in these communities beginning September 1, 1993, in which Century eliminated its CPS tiers and offered instead only a basic service tier and a few a la carte channels. In each of these orders, the Bureau found that Century's restructured service offerings do not constitute a clear evasion of our rate rules. Specifically, the Bureau found that Century did not avoid rate regulation of most of its previous CPS channels because it moved those channels into a rate-regulated basic tier. With regard to the other channels, the orders permit Century to treat its a la carte packages as new product tiers that may be priced at market levels under the *Going Forward Order*.

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[1] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[2] 47 C.F.R. § 76.956.

[3] 47 C.F.R. § 76.956(b).

[4] *Id.*

[5] *Order* in MM Docket No. 92-266, *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[6] *See Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking*, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (1994) ("*Second Order on Reconsideration*"); 47 C.F.R. § 76.922(b).

[7] *See Second Order on Reconsideration* at 4190, paras. 150-152.

[8] *Id.*

[9] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration* at 4189 n.195.

[10] *See Century Cable TV, Huntington, West Virginia*, LOI-93-49, DA 94-1314 (Cab. Serv. Bur. released Nov. 25, 1994); *Century Cable TV, Morgantown, West Virginia*, LOI-93-34, DA 94-1358 (Cab. Serv. Bur. released Dec. 2, 1994); *Century Cable TV, Muncie, Indiana*, LOI-93-18, DA 94-1354 (Cab. Serv. Bur. released Dec. 2, 1994); *Century Cable TV, Owensboro, Kentucky*, LOI-93-45, DA 94-1361 (Cab. Serv. Bur. released Dec. 2, 1994); *Century Cable TV, Yuma, Arizona*, LOI-93-39, DA 94-1360 (Cab. Serv. Bur. released Dec. 2, 1994); *Century Cable TV, Brunswick, Georgia*, LOI-93-44, LOI-94-4, DA 94-1426 (Cab. Serv. Bur. released Dec. 12, 1994); *Cable TV of Greater San Juan, San Juan, Puerto Rico*, LOI-93-38, DA 94-1425 (Cab. Serv. Bur. released Dec. 12, 1994).

[11] *See Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Sixth Order on Reconsideration, Fifth Report and Order, and Seventh Notice of Proposed Rulemaking*, MM Docket Nos. 92-266 and 93-215, FCC 94-286, ¶ 51 (adopted November 10, 1994).

5. Since the LOI orders found that the elimination of Century's CPS tiers does not constitute a clear evasion of rate regulation and those channels not placed on the basic service tier could be treated as a new product tier, there were no CPS tiers in those communities, as of September 1, 1993, that were subject to rate regulation pursuant to Section 76.922 of our rules. Therefore, the Bureau subsequently dismissed all FCC Form 329 complaints filed against Century in each of those seven communities.[12]

III. DISCUSSION

6. The rate cards and channel line-up cards submitted by Century for each of the subject communities indicate that Century restructured its service offerings in the subject communities on September 1, 1993 in essentially the same way that it did for the seven areas mentioned above where LOI orders have been issued. Specifically, Century discontinued its CPS offerings and placed all of its channels into a single basic service tier, except for a few channels which it offered on an a la carte basis. In the subject communities, Century offered three to six a la carte channels. Likewise, Century's a la carte offerings consisted of three to six channels in the above-mentioned areas where LOI orders have been issued.

7. We feel that we have sufficient information regarding Century's restructured offerings in the subject communities to conclude, in accord with the *Going Forward Order*, that they should be treated the same way that we treated Century's restructured offerings in the seven communities where we issued LOI orders. As in these latter communities, although the instant restructuring resulted in the elimination of Century's CPS tiers, the small number of channels that were offered in the a la carte packages did not constitute an evasion of our then existing rules. Therefore, consistent with the action taken in the LOI orders, we will allow Century to treat its a la carte packages in the subject communities as new product tiers even though they would not qualify as new product tiers under the *Going Forward Order* because one of the conditions for a new product tier is that channels may not be removed from a basic service tier or a CPS tier. Thus, we need not rule on the FCC Form 329 complaints filed against Century in the subject communities because there were no CPS tiers subject to rate regulation pursuant to Section 76.922 of our rules as of September 1, 1993. In addition, nothing in these complaints indicates that Century's new product tiers violate any of the conditions for establishing those tiers outlined in the *Going Forward Order*.[13]

IV. CONCLUSION

8. Accordingly, IT IS ORDERED that the a la carte packages created by Century Cable TV in the communities listed in the attached Appendix may be treated as new product tiers under our *Going Forward Order*.

9. IT IS FURTHER ORDERED that all FCC Form 329 complaints pending against the CPS rates of Century Cable TV in each of the communities listed in the attached Appendix are DISMISSED.

10. This action is taken pursuant to delegated authority under Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Deputy Chief, Cable Services Bureau

[12] *See Century Cable TV*, CUID Nos. IN0094, WV0156, WV0378, KY0120, AZ0019, DA 94-1422 (Cab. Serv. Bur. released Dec. 12, 1994); *Cable TV of Greater San Juan, San Juan, Puerto Rico*, CUID No. PR0001, DA 94-1530 (Cab. Serv. Bur. released Dec. 20, 1994); *Century Cable TV, Brunswick, Georgia*, CUID No. GA0040, DA 94-1531 (Cab. Serv. Bur. released Dec. 20, 1994).

[13] We have excused one violation, *i.e.*, migrating channels from rate-regulated tiers, in only those situations where, as here, the new product tier is established as an outgrowth of our change in our a la carte policy. *See Going Forward Order* at Para. 51.

APPENDIX

CUID	Community	8/31/93 *Pre-Regulation* Basic	Tiers	9/1/93 *Post Regulation* Basic	Tiers	A la Carte
AL0272	City of Hanceville	16	18	31	0	3
AZ0035	County of Yuma	14	17	28	0	3
CA0021	City of San Pablo	25	23	44	0	3
CA0753	County of Los Angeles	24	15	42	0	6
CA0216	City of Fort Bragg	16	19	32	0	3
CA0233	City of Ukiah	16	19	32	0	3
CT0112	Town of Salem	19	13	30	0	3
CT0040	Town of Lisbon	19	13	30	0	3
CT0041	Town of Sprague	19	13	30	0	3
CT0042	Town of Franklin	19	13	30	0	3
CT0043	Town of Bozrah	19	13	30	0	3
CT0095	Town of Preston	19	13	30	0	3
CT0108	Town of East Haddam	19	13	30	0	3
CT0109	Town of Haddam	19	13	30	0	3
CT0111	Town of Lyme	19	13	30	0	3
CT0172	Town of Colchester	19	13	30	0	3
MA0008	Great Barrington	18	25	44	0	4
MA0009	Town of Lee	18	25	44	0	4
MA0010	Town of Lenox	18	25	44	0	4
NM0008	City of Las Vegas	10	11	23	0	3
NM0042	County of Taos	10	14	20	0	4
NM0019	City of Portales	12	20	30	0	3
NM0041	San Miguel County	10	11	23	0	3
NY0256	City of Norwich	16	16	27	0	5
OH0363	City of Struthers	14	17	25	0	5

CUID	Community	8/31/93 *Pre-Regulation* Basic	Tiers	9/1/93 *Post Regulation* Basic	Tiers	A la Carte
OH0998	Township of Porter	17	17	31	0	3
OH0999	Township of Clay	17	17	31	0	3
OH0098	Village of New Boston	17	17	31	0	3
PR0004	City of Bayamon	17	28	44	0	3
PR0007	City of Carolina	17	28	44	0	3
WA0304	City of Woodland	14	10	23	0	3
WA0079	City of Longview	17	17	31	0	3
WI0357	West Milwaukee	18	23	39	0	4
WV0394	Monongalia County	14	17	28	0	3
WY0054	City of Evanston	12	17	25	0	4

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Paragon Cable Manhattan CUID No. NY0104
New York, New York

Benchmark Filing To Support
Cable Programming Service Prices

MEMORANDUM OPINION AND ORDER

Adopted: February 16, 1995; Released: February 17, 1995

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. Here we consider complaints about the price Paragon Cable Manhattan ("Paragon") was charging for its cable programming service ("CPS") tier in New York, New York, CUID No. NY0104. Paragon has chosen to attempt to justify its price through a benchmark showing on FCC Form 393. This order addresses the reasonableness of Paragon's price only through May 14, 1994. At a later time we will issue a separate order addressing the reasonableness of the price after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its rates through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

II. PROCEDURAL MATTERS

4. The first valid CPS complaint was completed and served on Paragon prior to September 1, 1993.[11] The Commission received the complaint on September 2, 1993.

5. Paragon attempted to justify its CPS price through an FCC Form 393 filed on November 15, 1993. Paragon amended its justification on May 31, 1994 in response to a Cable Services Bureau Order citing common deficiencies observed in benchmark filings generally; [12] and on December 14, 1994, December 27, 1994 and January 11, 1995 in response to Commission letters which requested further clarification of Paragon's amended showing.[13]

III. DISCUSSION

6. Paragon asserts that its monthly CPS tier price of $9.09 per subscriber is justified by its benchmark filing because its price equals the maximum permitted charge calculated in the filing. Upon review of Paragon's FCC Form 393, as amended, we have found the following errors that require a recalculation of Paragon's maximum permitted CPS price:

a. Paragon has included as franchise fees on Form 393, Part II, Worksheet 1, Line 108 $54,837 in payments to the Manhattan community access organization to support public, educational and governmental

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[1] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Paragon has sought to take advantage of the refund deferral period under the *Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking*, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (1994) ("*Second Order on Reconsideration*"), the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which Paragon implemented its CPS price under the new regulations. *See* para. 3, *infra*. Further, to the extent that the price for the period ending May 14, 1994 is found to be excessive, reductions in Paragon's price for the period after May 14, 1994 may be required to reflect the fact that Paragon's price during the earlier period, which is used as the starting point to calculate its price for the prospective period, was unreasonable. *See* 47 C.F.R. § 76.922(b)(4)(C).

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] *Order*, MM Docket No. 92-266, *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] *Second Order on Reconsideration*; 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration* at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration* at 4189 n.195.

[11] The complaint was dated August 31, 1993 and states that it was mailed to Paragon on that date. Paragon has not complied with 47 C.F.R. § 76.956(a), which requires it to state when service occurred. Under these circumstances we will consider September 1, 1993, the date when the Commission's rate regulations became effective, as the service date.

[12] *Cable Operators' Rate Justification Filings*, DA 94-526, 9 FCC Rcd 7752 (Cab. Serv. Bur. 1994).

[13] Letter from Peter G. Wolfe, FCC, to George James, Paragon Cable Manhattan (Dec. 2, 1994); letter from Peter G. Wolfe, FCC, to Arthur H. Harding, Esq., counsel for Paragon Cable Manhattan (Dec. 21, 1994); letter from Peter G. Wolfe, FCC, to Arthur H. Harding, Esq. (Jan. 9 , 1995).

("PEG") access channels. The effect of including these payments on Line 108 is to deduct them from Paragon's regulated revenues as of the initial date of regulation and thereby to reduce its base rate per channel. Under our rules, franchise fees are not included in an operator's regulated revenues for purposes of calculating its maximum permitted charge.[14] The reason for this exclusion is that the benchmark was calculated based on data that excluded franchise fees.[15] However, other external costs, including the costs of providing PEG channels, were not excluded from the benchmark calculation.[16] For this reason, such costs are included in regulated revenues, and changes in these costs after the initial date of regulation are reflected in adjustments to an operator's permitted rates.[17] Accordingly, Paragon's PEG access fees should be included in the per channel rate calculated in Part II of its Form 393.[18] We therefore adjust Paragon's submission to exclude the PEG charges from the franchise fees deducted on line 108.[19]

b. On its Form 393 filing, Paragon calculated the Inflation Adjustment Factor (line 127, Worksheet 1, Part II) as of the end of October 1993 using data released by the U.S. Department of Commerce on August 31, 1993. However, Paragon's use of October 1993 as the date through which it calculated the inflation adjustment is impermissible. Paragon was served with a rate complaint prior to September 1, 1993. The instructions to FCC Form 393, page 11, require that the Inflation Adjustment Factor be calculated using "the number of whole months from September 30, 1992 to the date you will submit this form." In general, a cable operator must submit a justification of its rates no more than 30 days after service of the earliest valid complaint.[20] Paragon cannot be permitted to claim an additional inflation adjustment simply because it did not file its Form 393 within this 30-day period. We must therefore recalculate the Inflation Adjustment Factor on the basis of the most accurate data currently available for the latest date contemplated by the Form 393 instructions.[21] On July 29, 1994, the Department of Commerce released corrected inflation data including Gross National Product Price Index ("GNP-PI") figures of 122.3 for the third quarter of 1992 and 125.7 for the third quarter of 1993. Using these GNP-PI figures, we calculate 1.028 as the Inflation Adjustment Factor through September 1993, the base date Paragon should have used in justifying its rates.

7. Because of these errors, we conclude that Paragon has failed to demonstrate that its price for the CPS tier was not unreasonable. We will therefore set a price for this tier, incorporating the adjustments discussed above. These adjustments have the cumulative effect of reducing the maximum permitted monthly CPS tier price from $9.09 (as Paragon calculated) to $8.41.[22]

IV. CONCLUSIONS

8. Upon review of the record herein, we conclude that Paragon's showing supports a maximum reasonable CPS tier price of $8.41 per month (plus franchise fee) for the period September 2, 1993 to May 14, 1994.[23] We further determine that we will order an appropriate refund pursuant to Section 76.957 of the Commission's Rules, 47 C.F.R. § 76.957, in order to reimburse subscribers for the amount they paid in excess of a reasonable price.

9. We further conclude that Paragon must reflect in its FCC Form 1200 rate filing for the period after May 14, 1994 the fact that Paragon's price during the earlier period was unreasonable.[24] We reserve the right to make further adjustments to Paragon's price for the period after May 14, 1994, upon completion of our review of Paragon's FCC Form 1200 rate filing.

10. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the August 31, 1993 complaint against the cable program-

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[14] 47 C.F.R. § 76.922(a).

[15] *Report and Order and Further Notice of Proposed Rulemaking*, MM Docket No. 92-266, FCC 93-177, 8 FCC Rcd 5631 at 6139-40, Appendix E, paras. 14-16 (1993).

[16] *Id.* at 5792, para. 257.

[17] *See* 47 C.F.R. § 76.922(d). This provision expressly distinguishes franchise fees from other costs of complying with franchise requirements, including PEG channel support fees, for purposes of external cost adjustments. 47 C.F.R. § 76.922(d)(3)(iv)(B) and (C). Changes in franchise fees are reflected in an adjustment separate from the maximum permitted monthly charge. 47 C.F.R. § 76.922(d)(viii).

[18] *See SBC Media Ventures, Inc.*, DA 94-1251, para. 19 (Cab. Serv. Bur. released Nov. 22, 1994). Paragon argues that 47 U.S.C. § 542(g) defines franchise fees to include PEG channel support fees required under a franchise agreement that was entered into after October 30, 1984. However, this definition applies only to the statutory limitation of franchise fees to five percent of gross revenues. The section of the Communications Act that governs rate regulation, by contrast, expressly distinguishes franchise fees from obligations to support PEG channels. 47 U.S.C. § 543(b)(2)(C)(v) and (vi).

[19] We do not, however, disallow $4897 which Paragon paid to New York City representing 5% of the imputed value of free services provided by Paragon. Unlike the PEG payments discussed above, those payments constitute a franchise fee within the meaning of our rules. Whether these payments result in the franchising authority collecting a franchise fee in excess of 5% of gross revenues, in violation of 47 U.S.C. § 542, is irrelevant for purposes of Form 393.

[20] *See* 47 C.F.R. § 76.956(a).

[21] *See* 47 C.F.R. § 76.922(b)(9)(iii) (if a cable operator fails to justify its rates, rates must be adjusted in accordance with the most accurate data available at the time of analysis).

[22] These adjustments have the effect of causing Paragon to calculate its permitted rates from Form 393, Part II, Worksheet 2 rather than Worksheet 1. However, Paragon failed to respond to the Commission's request that it complete Worksheet 2 of Form 393. *See* Paragon Response to Federal Communications Commission's Request (filed December 14, 1994). Therefore, we have computed Worksheet 2 by using data supplied by Paragon on its Form 1200 filing.

[23] This finding is based solely on the representations of Paragon listed in paragraph 5, *supra*, and the modifications described in paragraphs 6 and 7, *supra*. Should information come to our attention that these representations were inaccurate in any material way, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

[24] We reviewed Paragon's FCC Form 1200 rate filing and confirmed that Paragon calculated its rate for the period after May 14, 1994 using the rate that we find in this Order to be unreasonable.

ming service price charged by Paragon Cable Manhattan in New York, New York, CUID No. NY0104, and all other complaints relating to the same price, ARE GRANTED TO THE EXTENT INDICATED HEREIN.

11. IT IS FURTHER ORDERED, that the benchmark filing submitted by Paragon Cable Manhattan with respect to New York, New York, CUID No. NY0104, for the period of September 2, 1993 to May 14, 1994, justifies a maximum price of $8.41 per month (plus franchise fee) for Paragon Cable Manhattan's cable programming service tier.

12. IT IS FURTHER ORDERED, pursuant to Section 76.961 of the Commission's Rules, 47 C.F.R. §76.961, that Paragon Cable Manhattan shall refund to subscribers that portion of the amounts paid for cable programming service from September 2, 1993[25] to May 14, 1994, that exceeded $8.41 (plus franchise fee) per month and was thus unreasonable, plus interest to the date of the refund.

13. IT IS FURTHER ORDERED, that Paragon Cable Manhattan shall promptly determine the overcharges to CPS subscribers for the stated period, and shall within 30 days of the release of this Order file a report with the Chief, Cable Services Bureau, stating the cumulative refund amount so determined (including franchise fees and interest), describing the calculation thereof, and describing its plan to implement the refund within 60 days of Commission approval thereof.

14. IT IS FURTHER ORDERED, pursuant to Section 76.922(b)(4)(C) of the Commission's rules, 47 C.F.R. § 76.922(b)(4)(C), that Paragon Cable Manhattan shall, within 30 days of the release of this Order, revise its Form 1200 filing with respect to New York, New York, CUID No. NY0104, for the period beginning May 15, 1994, to reduce the monthly charge per tier as of March 31, 1994 for Tier 2 (Line A6b) to $8.41 (plus franchise fee).

15. IT IS FURTHER ORDERED, that Paragon Cable Manhattan shall place into effect, within 30 days after its submission of the revised Form 1200 filing required above, a price that reflects the reduction in the CPS rate determined in this Order.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

[25] Our jurisdiction to order a refund dates from the earliest date a valid complaint is filed with the Commission.47 C.F.R. § 76.961 (b).

Before the
Federal Communications Commission
Washington, D.C. 20554

PR Docket No. 89-552

In the Matter of

Amendment of Part 90 of the
Commission's Rules to Provide
for the Use of the 220-222 MHz
Band by the Private Land Mobile
Radio Services

ORDER

Adopted: February 16, 1995; Released: February 17, 1995

By the Chief, Wireless Telecommunications Bureau:

1. On August 19, 1994, the Private Radio Bureau released a Public Notice (DA 94-902)[1] extending the deadline for construction of non-nationwide 220 MHz stations from December 2, 1994 to April 4, 1995.[2] The Commission, in the *Third Report and Order*, GN Docket No. 93-252, Implementation of Sections 3(n) and 332 of the Communications Act, released September 23, 1994, 9 FCC Rcd 7988 (1994), again identified April 4, 1995 as the construction deadline for non-nationwide 220 MHz stations. In that decision, the Commission noted that the extension "gives these licensees approximately 12 months from the date of . . . [the March 30, 1994 *Order*] . . . to complete construction and commence operations . . . ."[3]

2. Recently, the Wireless Telecommunications Bureau received requests from three 220 MHz radio equipment manufacturers to extend the current construction deadline beyond April 4, 1995. The first of these was submitted by SEA, Inc. (SEA) in a letter sent to Regina M. Keeney, Chief, Wireless Telecommunications Bureau, on January 17, 1995. SEA asks that the deadline be extended to December 31, 1995 for those licensees who have, by placing equipment orders with manufacturers, demonstrated their intent to construct their 220 MHz stations. SEA argues that this extension is needed because the manufacturing capacity of the companies producing 220 MHz equipment "is not sufficient to fill existing orders by the April 4 deadline" and that those licensees who have placed orders "should not be required to forfeit their licenses" due to manufacturers' inability to deliver equipment by that date. As further support for its request, SEA contends that the *Evans v. FCC*[4] court appeal caused licensees to delay placing orders, and that, upon dismissal of the appeal, manufacturers were required suddenly to deliver equipment by a "single, across-the-board" deadline applicable to all licensees. SEA observes that, had the court case not occurred, manufacturers would have had to satisfy the less difficult requirement of filling orders to meet the progressive 8-month construction deadlines of the approximately 3,600 individual stations that were authorized over an extended period.

3. E.F. Johnson Company (EFJ), another 220 MHz equipment manufacturer, in a letter sent to Regina M. Keeney on January 25, 1995, supports SEA's request for an extension until December 31, 1995 for those 220 MHz licensees who have timely placed an equipment order with a manufacturer offering type-accepted equipment. EFJ argues that the current "compressed manufacturing and delivery schedule can simply not be met, even with the considerable resources [the company] will commit to the process" and contends that if an extension is not granted, the Commission will "irreparably harm the nascent 220 MHz industry and seriously set back efforts to employ spectrum efficient narrowband technology on a widespread basis."

4. Finally, the third manufacturer, Linear Modulation Technology Limited (LMT), a wholly-owned subsidiary of the Securicor Group plc, in a letter sent to Regina M. Keeney on February 1, 1995, also expresses support for the granting of an extension to December 31, 1995. LMT claims that, while it will be able to construct a significant number of 220 MHz systems by the April 4, 1995 deadline, it will not be able to deliver and construct by that date many of the orders for the "approximately one thousand full systems that licensees or managers of 220 MHz systems have attempted to place with LMT." LMT contends that, if those licensees who have tried to construct their systems by the deadline lose their licenses due to the unavailability of equipment, the prospects for the successful deployment of the 220 MHz service "will significantly diminish" and the U.S. 220 MHz industry will be placed "in serious jeopardy."[5]

5. The manufacturers of 220 MHz equipment have indicated that, despite their best efforts, equipment ordered by many non-nationwide 220 MHz licensees will not be delivered in time to enable such licensees to construct their stations by April 4, 1995. The Bureau believes that these licensees should be afforded some measure of relief from the current construction deadline. The Bureau is also concerned that a number of licensees, aware of manufacturers' production difficulties, have delayed the placement of orders or have chosen not to place orders at all under the assumption that the orders could not be filled by April 4,

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[1] The responsibility for licensing the 220 MHz radio service now resides in the Wireless Telecommunications Bureau.

[2] The December 2, 1994 deadline was announced in a Private Radio Bureau *Order* released on March 30, 1994 (*see* 9 FCC Rcd 1739 (1994)). In that *Order*, the Bureau, citing the court appeal challenging the Commission's 220 MHz licensing procedures (*see Evans v. Federal Communications Commission*, Order, per curiam, Case No. 92-1317 (D.C. Cir. March 18, 1994)) decided that, upon termination of the appeal, all non-nationwide 220 MHz licensees would be afforded the full 8 months provided under our rules (*see* 47 C.F.R. § 90.725(f)) to construct and operate their stations. The December 2, 1994 deadline reflected the approximate 8-month period following the March 30, 1994 release of the *Order*.

[3] *See* 9 FCC Rcd 8077 (1994).

[4] *See* footnote 2, *supra* .

[5] In addition to the letters received from these equipment manufacturers, certain other interested parties, including 220 MHz licensees, have submitted requests to the Wireless Telecommunications Bureau asking for construction deadline extensions of up to three years.

1995. Therefore, to provide relief to all licensees -- those that have placed orders as well as those that must still do so -- the Bureau extends to December 31, 1995 the deadline for non-nationwide 220 MHz licensees to construct their stations and place them in operation.

6. Accordingly, for good cause shown, IT IS ORDERED THAT the requests by SEA Inc., E.F. Johnson Company, Linear Modulation Technology Limited and other parties for extension of the deadline for construction of non-nationwide 220 MHz stations are GRANTED to the extent indicated herein and otherwise denied.

FEDERAL COMMUNICATIONS COMMISSION

Regina M. Keeney
Chief, Wireless Telecommunications Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

C-TEC Cable Systems, et al.	LOI-93-1; LOI-93-2; LOI-93-4; LOI-93-5; LOI-93-6; LOI-93-7; LOI-93-8; LOI-93-11; LOI-93-12;
Letters of Inquiry	LOI-93-13; LOI-93-14; LOI-93-15; LOI-93-16; LOI-93-17; LOI-93-18; LOI-93-19; LOI-93-21; LOI-93-22; LOI-93-23; LOI-93-24; LOI-93-25; LOI-93-26; LOI-93-27; LOI-93-28; LOI-93-29; LOI-94-2; LOI-94-3; LOI-94-4; LOI-94-6; LOI-94-7; LOI-94-8; LOI-94-9; LOI-94-10; LOI-94-11

MEMORANDUM OPINION AND ORDER

Adopted: February 16, 1995; Released: February 17, 1995

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. The Commission received letters and complaints from several cities and subscribers alleging that cable operators violated the Commission's temporary freeze of regulated cable service rates.[1] In response to these letters and complaints, the Commission issued letters of inquiry to a number of cable operators.[2] The LOI's asked the cable operators to provide information concerning, among other issues, their compliance with the Commission's *Rate Freeze Order*.[3]

II. BACKGROUND

2. In the *Rate Freeze Order*, the Commission ordered that rates of cable services subject to regulation under the Cable Television Consumer Protection and Competition Act of 1992[4] ("1992 Cable Act") be frozen as of April 5, 1993. The *Rate Freeze Order* sought to ensure that, pending implementation of cable service rate regulation, cable operators not continue to raise rates, "effectively undermining the statutory purpose of reasonable rates."[5] The rate freeze afforded local franchising authorities an opportunity to become certified to regulate the basic service tier and allowed consumers to become familiar with and to exercise their rights to invoke Commission oversight of cable programming service tiers.[6] The freeze was extended until May 15, 1994 in order to provide franchising authorities and other affected parties sufficient time to become familiar with pending modifications to the Commission's rate regulations before the freeze was lifted.[7]

3. The *Rate Freeze Order* required that the average monthly subscriber bill for cable services subject to rate regulation under the 1992 Cable Act could not increase above the level determined under rates in effect on April 5, 1993. The freeze did not preclude cable operators from adding subscribers, programming offerings, equipment or other services as long as the average monthly subscriber

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[1] *See Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, MM Docket 92-266, *Order*, 8 FCC Rcd 2921 (1993) (*"Rate Freeze Order"*), *clarified*, 8 FCC Rcd 2917, 58 FR 21929 (April 26, 1993); *extended*, FCC 93-304 (released June 15, 1993), 58 FR 33560 (June 18, 1993) (*"Deferral Order"*), *Erratum*, 8 FCC Rcd 4511 (1993); *extended*, FCC 93-494 (released November 10, 1993), 58 FR 60141 (November 15, 1993) (*"November 10 Extension Order"*); *extended*, 9 FCC Rcd 1299, 59 FR 6901 (February 14, 1994) (*"February 8 Extension Order"*). Generally, these orders required operators to freeze the average amount of revenues received per subscriber for regulated cable services at the level in effect on April 5, 1993. The freeze was effectuated by requiring that the average monthly subscriber bill for services subject to rate regulation may not increase above the average monthly subscriber bill in effect on April 5, 1993. 8 FCC Rcd 2921-2922.

[2] *See* Appendix.

LOI-93-1 addressed complaints received by the Commission regarding 16 Michigan communities. In an order released December 30, 1994, the inquiry initiated by LOI-93-1 was terminated with regard to 14 of those communities (Wayland Township, City of Grayling, City of Grand Haven, City of Greenville, Caledonia Charter Township, Village of Spring Lake, Village of Pentwater, City of Stanton, City of Hudsonville, Robinson Township, City of Rockford, Cannon Township, City of Cadillac, and Grand Haven Charter Township). *C-TEC Cable Systems, McBain, Michigan and Zeeland Charter Township, Michigan*, LOI-93-1 (released December 30, 1994). This order therefore addresses C-TEC's actions only in the remaining two communities covered by LOI-93-1, McBain and Zeeland Charter Township, Michigan.

LOI-93-9, Coldwater Cablevision, Inc., City of Coldwater Michigan and LOI-93-10, Mercom, Inc., City of Plainwell, Michigan also requested information concerning compliance with the *Rate Freeze Order*. By letters dated December 20, 1994, the Commission terminated the inquiries initiated by LOI-93-9 and LOI-93-10. *See* Letter from Meredith J. Jones, Chief, Cable Services Bureau, FCC, to Gardner F. Gillespie, DA 94-1543 (December 20, 1994) (LOI-93-9); Letter from Meredith J. Jones, Chief, Cable Services Bureau, FCC, to Gardner F. Gillespie, DA 94-1544 (December 20, 1994) (LOI-93-10).

[3] Many of the LOI's also requested information concerning other issues, including, *inter alia*, negative option billing, and the regulatory status of a la carte packages. This order addresses only the rate freeze issue. The Bureau previously has released orders resolving issues concerning the regulatory status of a la carte packages, *see, e.g., Warner Cable Communications*, Milwaukee, Wisconsin, LOI-93-14, DA 94-1276 (released November 18, 1994), and has issued orders on negative option billing issues in two cases, *Warner Cable Communications*, Milwaukee, Wisconsin, LOI-93-14, DA 95-60 (released January 20, 1995) and *Comcast Cablevision*, Tallahassee, Florida, LOI-93-2, DA 95-61 (released January 20, 1995).

[4] Pub. L. No. 102-385, 106 Stat. 1460 (1992).

[5] *Rate Freeze Order*, 8 FCC Rcd at 2921.

[6] *Rate Freeze Order*, 8 FCC Rcd at 2911-22. *See also Clarification Order*, 8 FCC Rcd at 2918.

[7] *February 8 Extension Order*, 9 FCC Rcd at 1300.

bill was maintained during the freeze period.[8] In addition, the freeze did not preclude cable operators from "increas[ing] the charge for a tier or provision of equipment as long as the average monthly subscriber bill [did] not increase" during the freeze period.[9] The freeze thus permitted operators to make reasonable changes in the structures of their tiers of service in response to the Commission's rate regulations while still protecting consumers from overall rate increases.[10] In particular, the freeze was "intended to permit changes in individual rate components while constraining increases in overall rate levels.[11]

III. DISCUSSION

4. The letters of inquiry requested operators to complete a rate freeze computation form to determine whether the operator's average monthly subscriber bill for regulated cable services increased above the average monthly subscriber bill for regulated cable services determined under rates in effect on April 5, 1993. The rate freeze computation form requested information concerning operators' services and rates as of April 5, 1993 and for the first full monthly billing cycle after they made changes in rates or restructured their rates.

5. With the exception of C-TEC Cable Systems ("C-TEC") and Century Southwest Cable TV ("Century Southwest"), based upon our review of the responses to our letters of inquiry and the rate freeze computation forms of the operators listed in the attached Appendix, we cannot conclude that violations of the *Rate Freeze Order* occurred. In particular, the evidence presented in the cable operators' responses to our letters of inquiry and in the rate freeze computation forms does not permit us to conclude that the average monthly subscriber bill for regulated cable services for any of these operators increased above the average monthly subscriber bill for regulated cable services determined under rates in effect on April 5, 1993. In this regard it should be noted that while operators may have increased prices for some regulated cable services and equipment, such increases do not violate the rate freeze as long as the average monthly subscriber bill for regulated cable services did not increase above the average monthly subscriber bill for regulated cable services in effect on April 5, 1993.[12]

6. Based upon our review of the responses to our letters of inquiry and rate freeze computation forms submitted by C-TEC and Century Southwest, it appears that C-TEC and Century Southwest may have been in violation of the rate freeze from the date they restructured their service offerings, September 1, 1993, until either May 15, 1994 or the date on which their basic service tiers became subject to regulation, whichever is earlier.[13] In particular, the rate freeze computation forms show that for C-TEC's Zeeland Charter Township systems[14] and Century Southwest's Beverly Hills system, the average monthly subscriber bill for regulated cable services as of the first full monthly billing cycle after changes in rates or restructuring occurred increased above the average monthly subscriber bill for regulated cable services determined under rates in effect on April 5, 1993. In calculating the average monthly subscriber bill as of the first full monthly billing cycle after restructuring occurred, we included revenues from C-TEC's and Century Southwest's collective or package offerings of certain individually offered ("a la carte") channels. These a la carte packges were the subject of our orders in *C-TEC Cable Systems, McBain and Zeeland Charter Township, Michigan*, LOI-93-1, DA 94-1622 (Cab. Serv. Bur., released Dec. 30, 1994) and *Century Southwest Cable TV, Beverly Hills and Los Angeles, California*, LOI-93-17, DA 94-1553 (Cab. Serv. Bur., released Dec. 22, 1993). In those orders, we found that a la carte package offerings of both C-TEC and Century Southwest must be treated as rate regulated as of September 1, 1993.[15]

7. When the revenues from C-TEC's and Century Southwest's a la carte offerings are included in the calculation of revenues from regulated service offerings, C-TEC's rate freeze computation form shows that on its Zeeland Charter Township systems, the average monthly subscriber bill for regulated services as of April 5, 1993 was $21.98 and the average monthly subscriber bill for regulated services as of October 31, 1993 was $22.84, and Century Southwest's rate freeze computation form shows that on its Beverly Hills system, the average monthly subscriber bill for regulated services as of April 5, 1993 was $33.85 and the average monthly subscriber bill for regulated services as of October 31, 1993 was $35.02.

8. As indicated above, the evidence with respect to C-TEC and Century Southwest shows a violation of the rate freeze when revenues from their a la carte packages are included in the computation of revenues from rate-regulated service offerings. In our previous letter of inquiry orders we required C-TEC and Century Southwest to count as rate-regulated channels the channels comprising their a

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[8] *Rate Freeze Order*, 8 FCC Rcd at 2921-22.

[9] *Id.*, 8 FCC Rcd at 2922.

[10] *Id.*

[11] *Clarification Order*, 8 FCC Rcd at 2918.

[12] *See* para. 3, *supra*.

[13] The freeze ended May 15, 1994 or the date on which an operator's basic service tiers became subject to regulation. *See February 8 Extension Order*, 9 FCC Rcd at 1300 ; *November 10 Extension Order*, 58 FR at 60142-43. In the *November 10 Extension Order* the Commission stated that the freeze would no longer apply to regulated cable services provided by cable operators whose basic cable service had become subject to rate regulation by a local franchising authority or the Commission. *Id.* at n.12.

[14] C-TEC serves Zeeland Charter Township from two systems, Blendon/Hudsonville and Holland. C-TEC's rate freeze computation form for Zeeland Charter Township appears to include data from both systems.

[15] C-TEC's a la carte offering on its Zeeland Charter Township systems at issue in our *C-TEC Cable Systems* order and included in our computation of revenues from rate-regulated service offerings for purposes of determining compliance with the *Rate Freeze Order* is comprised of the following channels: Nickelodeon, The Discovery Channel, Turner Network Television, The Nashville Network, Cable News Network, Arts & Entertainment, Headline News, Music TV, USA Network, Lifetime, Comedy Central, The Weather Channel, PASS/Country Music TV, American Movie Classics, VH-1, ESPN, and CNBC (Arts & Entertainment was not offered on C-TEC's Holland system in Zeeland Charter Township). Century Southwest's a la carte offering on its Beverly Hills system at issue in our *Century Southwest Cable TV* order and included in our computation of revenues from rate-regulated services offerings purposes of determining compliance with the *Rate Freeze Order* is comprised of the following channels: Turner Network Television, Cable News Network, Turner Broadcast Systems, American Movie Classics, Bravo, The Discovery Channel, Galavision, CNBC, WOR, VH-1, Arts & Entertainment, and Headline News.

la carte packages going back to September 1, 1993.[16] Therefore, these operators are subject to such refund liability as may be required to comply with the rate re-calculations reflecting the rate-regulated status of these packages required by of our previous letter of inquiry orders. Thus, C-TEC and Century Southwest's incorrect exclusion of the a la carte channels from the package of services subject to regulation referenced in the previous letter of inquiry orders and our present conclusion regarding the rate freeze violation relate to essentially the same legal controversy and conduct. Accordingly, we conclude that no further action, beyond that specified in our previous orders in *C-TEC Cable Systems* and Century Southwest Cable TV is warranted at this time.

IV. ORDERING CLAUSES

9. Accordingly, IT IS ORDERED, that the Commission's letters of inquiry with respect to allegations of rate freeze violations invoving C-TEC Cable Systems, McBain and Zeeland Charter Township, Michigan and Century Southwest Cable TV, Beverely Hills and Los Angeles, California are terminated subject to compliance by the systems' operators with our previous orders in *C-TEC Cable Systems, McBain and Zeeland Charter Township, Michigan,* LOI-93-1, DA 94-1622 (Cab. Serv. Bur., released Dec. 30, 1993) and *Century Southwest Cable TV, Beverely Hills and Los Angeles, California,* LOI-93-17, DA 94-1553 (Cab. Serv. Bur., released Dec. 22, 1994).

10. IT IS FURTHER ORDERED that the Commission's letters of inquiry with respect to the other allegations of rate freeze violation listed in the attached Appendix are terminated.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

APPENDIX

C-TEC Cable Systems, McBain and Zeeland Charter Township, Michigan, LOI-93-1 (November 17, 1993)

Comcast Cablevision, City of Tallahassee, Florida, LOI-93-2 (November 17, 1993)

MetroVision, Prince George's County, Maryland, LOI-93-4 (November 17, 1993)

Triax Cablevision, LOI-93-5 (November 17, 1993)

Cable Satellite of South Miami, Dade County, Florida, LOI-93-6 (November 17, 1993)

Meredith Cable, North Suburbs, Minnesota, LOI-93-7 (November 17, 1993)

Crown Cable, Walnut, California, LOI-93-8 (November 17, 1993)

Cablevision of Raleigh, Raleigh, North Carolina, LOI-93-11 (November 17, 1993)

Cablevision of Boston, LOI-93-12 (November 17, 1993)

US Cable, City of Lake Forest and Village of Lake Bluff, Illinois, LOI-93-13 (November 17, 1993)

Warner Cable Communications, Milwaukee, Wisconsin, LOI-93-14 (November 17, 1993)

MultiVision Cable TV, Prince George's County, Maryland, LOI-93-15 (November 17, 1993)

Time Warner Cable, Everett, Winthrop, and Somerville, Massachusetts, LOI-93-16 (December 13, 1993)

Century Southwest Cable TV, Beverly Hills and Los Angeles, California LOI-93-17 (December 13, 1993)

Century Cable TV, Muncie, Indiana, LOI-93-18 (December 13, 1993)

Comcast Cablevision, Mt. Clemens, Michigan, LOI-93-19 (December 13, 1993)

United Artists Cable, Baltimore, Maryland, LOI-93-21 (December 13, 1993)

Meredith Cable, North Central, Minnesota, LOI-93-22 (December 13, 1993)

Nashoba Cable Services, Danvers, Massachusetts, LOI-93-23 (December 13, 1993)

Vision Cable of North Carolina, Charlotte, North Carolina, LOI-93-24 (December 13, 1993)

Paragon Cable, Irving, Texas, LOI-93-25 (December 13, 1993)

CableVision of Central Florida, LOI-93-26 (December 13, 1993)

St. Louis Tele-Communications, St. Louis, Missouri, LOI-93-27 (December 13, 1993)

TCI Cablevision of Eastern Shore, Ocean City, Maryland, LOI-93-28 (December 13, 1993)

Cablevision, Bedford Heights, Ohio, LOI-93-29 (December 13, 1993)

Falcon Cable TV, Southern Shores, North Carolina, LOI-94-2 (February 22, 1994)

Lexander Cablevision, Whigham, Georgia, LOI-94-3 (February 22, 1994)

Century Cable TV, Brunswick, Georgia, LOI-94-4 (February 22, 1994)

Cablevision of Raleigh, Hillsborough, North Carolina, LOI-94-6 (February 22, 1994)

Cablevision Industries, Wake Forest, North Carolina, LOI-94-7 (February 22, 1994)

Cablevision of Raleigh, Knightdale, North Carolina, LOI-94-8 (February 22, 1994)

Cablevision Industries, Smithfield, North Carolina, LOI-94-9 (February 22, 1994)

Cablevision Industries, Morrisville and Hillsborough, North Carolina, LOI-94-10 (February 22, 1994)

Comcast Cablevision, Sterling Heights, Michigan, LOI-94-11 (February 22, 1994)

[16] *C-TEC Cable Systems,* ¶34 , *Century Southwest Cable TV,* ¶27.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Applications of
NEXTEL COMMUNICATIONS, INC.

For Transfer of Control of
ONECOMM CORPORATION, N.A., and
C-CALL CORP.

ORDER

Adopted: February 17, 1995; Released: February 17, 1995

By the Chief, Wireless Telecommunications Bureau:

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I. OVERVIEW

1. On August 12, 1994, OneComm Corporation, N.A. ("OneComm") submitted an FCC Form 703 application seeking consent to transfer control of certain 800 MHz Specialized Mobile Radio ("SMR") licenses to Nextel Communications, Inc. ("Nextel") pursuant to 47 C.F.R. § 90.153. As part of the same transaction, OneComm also requested consent to transfer control of licenses held by a OneComm affiliate, C-Call Corp., to Nextel. These licenses will be transferred as part of a merger in which OneComm will become a wholly-owned subsidiary of Nextel.

2. The Private Radio Bureau ("PRB") solicited comments from the public to assist in determining whether the proposed transfer of control is in the public interest.[1] Opponents of the transfer argue that Nextel's spectrum consolidation would not serve the public interest because it would decrease the number of competitors and increase prices. Supporters of the transfer contend that it will enhance competition in the Commercial Mobile Radio Services ("CMRS") market among SMR, cellular, and Personal Communications Services ("PCS") providers. After considering the record, we decide that the public interest is best served by approving the transfer, which we believe will promote competition in the broader CMRS marketplace.

3. OneComm's application includes the proposed transfer of unconstructed SMR licenses to Nextel. Although we generally approve the transfer of control, we limit the transfer of authorizations for unconstructed facilities to stations with service contours that do not extend beyond the "footprint" of already constructed facilities.[2] Thus, our approval is contingent on a showing by OneComm, within thirty (30) days of the date of this Order, that all applications for unconstructed facilities being transferred to Nextel have service contours that fall within the footprint of its existing wide-area system. Those authorizations for unconstructed stations that fall outside of OneComm's footprint may not be transferred unless OneComm can establish that they are incidental to the larger transaction.[3] We further condition the transfer on notification from theparties that the underlying transaction between Nextel and OneComm has been consummated within one-hundred eighty days (180) days from the release date of this Order.

4. In addition, certain authorizations that OneComm proposes to transfer to Nextel have been challenged by various parties.[4] OneComm may transfer such authorizations, but they remain subject to the Bureau's decision on the validity of the underlying authorizations. Therefore, OneComm's successor in interest, Nextel, will receive the assigned licenses subject to challenges against these specific authorizations.[5]

II. BACKGROUND

5. OneComm is a Denver-based, publicly-traded corporation which owns and operates SMR systems throughout the Western United States. OneComm, formerly CenCall Communications Corporation, was established in 1989 and completed an initial public offering of shares in 1993.[6] On

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[1] Since the October 3, 1994 Public Notice was issued, responsibility for approving transfers of control in this service has been transferred from PRB to the newly established Wireless Telecommunications Bureau.

[2] *See* Letter from Ralph A. Haller, Chief, Private Radio Bureau, to Mr. David E. Weisman (Dec. 23, 1992) ("Weisman Letter"), 8 FCC Rcd 143, 144 (1992).

[3] *See Third Report and Order*, "Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services," GN Docket No. 93-252, 9 FCC Rcd 7988 (*"CMRS Third Report and Order"*) at 8160, ¶ 393.

[4] *See, e.g.*, Earl's Petition for Reconsideration (filed Oct. 7, 1994); Clark Petition for Reconsideration and Special Relief (filed Oct. 18, 1994); Idaho Communications Petition for Reconsideration (filed Nov. 18, 1994).

[5] Challenged authorizations include, but are not limited to, the following call signs: WPEU913, WPEU929, WPEU917, WPEU992, WPEU921, WPER724, WPER756, WPEW598, WPEU933, WPEV200.

[6] OneComm Opposition to Earl's Petition for Reconsideration at 1, n. 1.

May 26, 1994, the company received shareholder approval to change its name formally from CenCall to OneComm Corporation.[7] OneComm's services include mobile telephone, alpha-numeric paging, and two-way radio service.[8] OneComm has implemented advanced digital technology using the Motorola Integrated Radio System ("MIRS") in the Colorado Front Range and the I-5 corridor from Seattle, Washington to Portland, Oregon.[9]

6. Nextel is a publicly-traded U.S. corporation, based in Rutherford, New Jersey, which owns numerous subsidiaries that hold SMR licenses throughout the United States. Nextel intends to implement a nationwide, seamless, all-digital integrated network capable of providing services similar to existing cellular and future PCS offerings.[10] Nextel currently provides and also expects to continue to offer dispatch service. To complete its nationwide system, Nextel has entered into several agreements to acquire 800 MHz regional SMR licenses, one of which is with OneComm.[11]

7. In addition to acquiring regional companies, Nextel entered into an "Agreement and Plan of Contribution and Merger" ("Agreement") with Motorola, Inc. ("Motorola") on August 4, 1994.[12] The Agreement involves, *inter alia*, the transfer of Motorola's SMR licenses to Nextel in exchange for approximately 24% of Nextel's voting stock. In addition, Nextel has agreed to use Motorola's MIRS technology to establish its wide-area digital network.[13] MIRS can produce approximately a fifteen-fold increase in SMR system capacity over an analog system and provide the infrastructure for a seamless nationwide SMR system.[14]

8. The U.S. Department of Justice ("DOJ") has reviewed the Nextel-Motorola Agreement, as well as the OneComm and Dial Page transactions, to determine whether Nextel's acquisitions violate U.S. antitrust laws. DOJ approved the Nextel acquisitions in a proposed Final Judgment, subject to Nextel's divestiture of forty-two 800 MHz channels in Atlanta once the Dial Page transaction is completed.[15] The DOJ Proposed Final Judgment also imposes a cap on the amount of 900 MHz spectrum that may be owned and controlled by Nextel and Motorola in thirteen specific cities.[16] On October 27, 1994, the United States, Motorola, and Nextel filed a stipulation in the United States District Court for the District of Columbia consenting to the entry of the Proposed Final Judgment.[17]

III. PLEADINGS

9. Pursuant to Section 90.153 of the Commission's rules, PRB issued a Public Notice on October 3, 1994, soliciting comments on OneComm's application for transfer of control to assist in a determination of whether the proposed transfers are in the public interest, convenience or necessity.[18] In response to the Public Notice, Clark's Electronics, Teton Communications, Radio Service Company, Zundel's Radio, Business Radio, and Accu Comm (hereinafter collectively "Clark") filed joint comments, and E.F. Johnson Company ("E.F. Johnson") and Pittencrieff Communications, Inc. ("Pittencrieff") filed individual comments.[19] OneComm, Nextel, Motorola, and Earl's Distributing Company ("Earl's") filed reply comments. Kentec Communications, Inc., *et al.*, ("Kentec") filed a motion for extension of time, which was denied on October 21, 1994.[20]

10. On November 3, 1994, OneComm amended its application to include additional licenses omitted in its August 12, 1994 application.[21] Also on November 3, 1994, Motorola requested that the record be reopened to include the Proposed Final Judgment between Motorola, Nextel, and the Department of Justice. In consideration of the new filings, we reopened the comment period for one week, from November 14-21, 1994, requesting additional comments on OneComm's amended applications and the relevance, if any, of the DOJ Proposed Final Judgment to the OneComm/Nextel transfer.[22]

11. In response to the Second Notice, OneComm and Motorola filed comments. Clark filed two sets of comments relating to the DOJ Proposed Final Judgment after the November 21, 1994 deadline.[23] Along with its late-filed comments, Clark filed a Motion to Accept Pleading. Clark claims that we should accept its late-filed comments because the one-week period that PRB allotted to comment on the DOJ Proposed Final Judgment was insufficient. In addition, Clark asserts that Motorola failed to provide the

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[7] *Id.*

[8] *Id.*

[9] *Id.*at 4-5.

[10] Motorola Reply Comments at 6.

[11] On August 5, 1994 Nextel also entered into an agreement to acquire Dial Page, which holds 800 MHz licenses in twelve Southwestern states. *See U.S. v. Motorola, Inc. and Nextel Communications, Inc.*, Case No. 1:94 CV02331 (Hogan, J.) (D.C., District of Columbia, filed Oct. 27, 1994), Competitive Impact Statement ("CIS") at 8.

[12] Motorola Reply Comments at 5.

[13] *Id.*

[14] *Id.*at 2.

[15] *U.S. v. Motorola, Inc. and Nextel Communications, Inc.*, Civil Action No. 94 2331 (D.D.C.) ("DOJ Proposed Final Judgment") at 7. The Proposed Final Judgment remains subject to final approval by the court. Because our analysis in this Order is based on the Commission's own policies and rules, however, our decision to grant OneComm's application is not conditioned on such approval.

[16] *Id.* at 5.

[17] *Id.*

[18] *See* 47 C.F.R. § 90.153 ; *see also Public Notice*, "Private Radio Bureau Seeks Comments On OneComm Corporation's Request For Commission Consent to Transfer Control to Nextel Communications, Inc.," DA 94-1087 (Oct. 3, 1994).

[19] *See* Appendix A for a list of comments, dates filed, and short-form citations used throughout this Order.

[20] *See Order*, DA 94-1185 (Oct. 21, 1994). We denied the motion for extension of time filed by Kentec Communications, Inc., James A. Kay, Jr., Ron Zahller, and Pro-Tec Mobile Communications, Inc. because the parties were granted sufficient time to prepare comments, and the motion was untimely. Furthermore, we reopened the comment period for one week to enable the parties to comment on additional filings, and therefore Kentec had a second opportunity to submit comments. *See* n.22, *infra*.

[21] Amendment of Transfer of Control Application of C-Call Corporation, filed Nov. 3, 1994.

[22] *See Public Notice*, DA 94-1256, "Private Radio Bureau Seeks Further Comment on OneComm Corporation's Request for Commission Consent to Transfer Control to Nextel Communications, Inc.," Nov. 14, 1994 ("Second Notice").

[23] Preliminary Comments on Proposed Antitrust Final Judgment, filed Nov. 30, 1994 ("Clark Preliminary DOJ Comments") and Clark Comments on Proposed Antitrust Final Judgment, filed Dec. 14, 1994 ("Clark DOJ Comments").

Commission with two documents that are relevant to this proceeding, namely the Complaint and the Competitive Impact Statement ("CIS"), both of which were filed in District Court along with the Proposed Final Judgment.[24] Clark provided copies of both of these documents for the record along with its comments.[25]

12. Although typically we do not accept late filings, we agree with Clark that the Complaint and the CIS are relevant to this proceeding.[26] The additional documents provide the context and reasoning behind the DOJ Proposed Final Judgment. Therefore, we accept Clark's late-filed comments, and we have considered Clark's arguments to the extent they apply to the OneComm transfer of control to Nextel.

13. In a separate but related context, Clark filed a Petition for Reconsideration and Special Relief, and Idaho Communications, L. P., *et al.*, ("ICLP") filed a Petition for Reconsideration. Both Clark and ICLP request that we rescind certain OneComm 800 MHz SMR authorizations in light of the proposed transfer to Nextel. ICLP asserts that the Commission granted OneComm two new SMR licenses in violation of the August 9, 1994 freeze Order.[27] Although we do not address rescission issues in this Order, we consider the arguments raised by Clark and ICLP to the extent that they relate to the OneComm transfer of control to Nextel.

14. Clark and E.F. Johnson, opponents of the transfer of control, contend that the transfer is not in the public interest because it would permit Nextel to monopolize SMR radio frequencies.[28] They claim that OneComm's transfer of authorizations for unconstructed facilities to Nextel violates Commission rules. Several commenters also assert that the transfer of control is not in the public interest because Nextel's agreement to use Motorola's MIRS technology will exclude manufacturers other than Motorola from the wide-area SMR marketplace.[29] Clark's comments on the DOJ Proposed Final Judgment attack both DOJ's and the Commission's definition of the product market. Clark claims that the relevant product market for analyzing competition issues is the 800 MHz SMR market.[30] Clark therefore concludes that Nextel's domination of the 800 MHz SMR market -- which Clark contends will be exacerbated by Nextel's acquisition of OneComm -- is anti-competitive and against the public interest.[31]

15. OneComm, Nextel, Motorola, and Pittencrieff, supporters of the transfer, argue that SMR licensees must be permitted to aggregate spectrum and employ digital technologies in order to compete with both cellular providers and broadband PCS providers. Supporters conclude that the transfer of control is in the public interest because it will promote competition in the CMRS marketplace, thereby increasing the number of services and reducing prices for consumers. Motorola also responded to the equipment issue by stating that it has already agreed to license MIRS technology to other manufacturers under commercially reasonable terms and conditions, so that other manufacturers will not be excluded from providing equipment for wide-area SMR systems.[32] With respect to the DOJ Proposed Final Judgment, OneComm and Motorola argue that the Commission should expeditiously approve the transfer of control because DOJ has already reviewed the antitrust implications, including the equipment aspects, and has approved the overall transaction.[33]

IV. PROCEDURAL ISSUES

A. Request to Consolidate Proceedings

16. *Background.* Clark requests that we consolidate this proceeding with Motorola's request for assignment of licenses to Nextel, which Motorola filed on December 9, 1994.[34] Clark claims that both of these transactions involve the same issues and therefore should be resolved in one action.[35] Clark also argues that consolidation is appropriate because DOJ joined the two transactions in its analysis.[36]

17. Section 1.227 of the Commission's rules provides for consolidation where "such action will best conduce to the proper dispatch of business and to the ends of justice."[37] Section 1.227 further provides that consolidation is appropriate when the same applicant or substantially the same issues are involved.[38] In the past, the Commission has denied requests for consolidation when the business transactions involved are independent, and neither is conditioned on the consummation of the other.[39]

18. *Discussion.* We agree with Nextel and Motorola that in this instance consolidation is not appropriate.[40] OneComm and Motorola, the two applicants involved here, are distinct entities. They both happen to have entered into agreements with the same party, Nextel, but the agreements involve different business terms, are structured differently, and are neither interrelated nor dependent on one another. We believe it would not serve the public interest to delay consummation of the OneComm transaction simply because Motorola also requested permission to transfer licenses to Nextel four months later.

19. We also agree with Motorola that, for our purposes, it is irrelevant whether or not DOJ considered the transactions together.[41] The purpose of DOJ's analysis was to examine the cumulative competitive impact of a number of

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[24] Clark Motion to Accept Pleading at 2-3; Clark DOJ Comments at 2.
[25] *See* Clark DOJ Comments, Exhibit A.
[26] Clark DOJ Comments at 3.
[27] *See CMRS Third Report and Order*, 9 FCC Rcd at 8048, ¶ 108.
[28] *See, e.g.*, Clark Comments at 1,3,7; E.F. Johnson Comments at 5-7; Earl's Reply Comments at 1-2.
[29] *See, e.g.*, E.F. Johnson Comments; Clark Comments at 8.
[30] Clark DOJ Comments at 6.
[31] *Id.* at 14-16.
[32] Motorola Comments at 8-9.
[33] *See* OneComm DOJ Comments; Motorola DOJ Comments.
[34] *See* Clark Motion To Consolidate Actions.
[35] *Id.* at 3.
[36] Clark Reply to Oppositions of Motorola and OneComm to Clarks' Motion to Consolidate Actions at 4.
[37] 47 C.F.R. § 1.227.
[38] *Id.*
[39] *See, e.g., In re Comsat/Contel*, 2 FCC Rcd 7202 (1987) at 7205, ¶ 22.
[40] Nextel Reply Comments, DA 94-1567 (filed Jan. 20, 1995) at 7; Motorola Opposition to Motion to Consolidate Actions, DA 94-1567 (filed Jan.20, 1995).
[41] Motorola Opposition to Motion to Consolidate Actions at 2.

proposed acquisitions by Nextel. DOJ's antitrust analysis is separate from the Commission's duty to ascertain whether a particular transfer or assignment proposal is in the public interest, convenience, and necessity.[42]

20. Furthermore, although some of the issues overlap between the OneComm and Motorola assignments, the transfer applications also raise distinct issues that are properly dealt with separately. For example, Clark claims that OneComm failed to inform the Commission of a prior proposed merger with Nextel in violation of Section 1.65 of the Commission's rules.[43] No such allegations have been made with respect to Motorola. Also, the licenses OneComm seeks to transfer are concentrated mostly in the Northwestern region of the United States, whereas Motorola's licenses are geographically more dispersed. Because different issues are involved, we could grant one application, both applications, or neither application. Therefore, we will determine whether to grant each application in the order in which it was filed, based on the facts current at the time the application is processed.

B. Request for Special Relief from Technical Interference

21. Clark requests special relief from technical interference, which it claims will be caused to its licensed facilities in Idaho by OneComm/Nextel proposed operations. According to Clark, PRB's Licensing Division ignored the similarity of terrain conditions in Southern Idaho to those of California and Washington -- both of which are afforded greater co-channel separations because of their mountainous terrain -- when granting OneComm authorizations.[44]

22. We agree with OneComm that the Commission has adopted special rules for mountainous regions only for California and Washington, not Idaho.[45] OneComm is therefore in compliance with the Commission's existing short-spacing rules for Idaho. We also agree with OneComm that the appropriate forum for addressing interference in mountainous areas is a rule-making proceeding, -not a request for special relief.[46] Thus, if Clark would like the Commission to change the short-spacing rules for Idaho, Clark should file a petition for rule making requesting a rule change. We will not delay the transfer of control to Nextel because of potential technical interference.

V. DISCUSSION

A. Impact of Merger on Competition

23. *Background.* The most contentious issue raised in this proceeding involves the impact of the OneComm/Nextel merger on competition. Nextel proposes to build a nationwide, all-digital, integrated mobile communications network which will compete with existing wireless and future PCS offerings. In its quest to establish a nationwide system, Nextel has acquired or is in the process of acquiring local and regional SMR systems throughout the United States. In the current transaction, Nextel seeks to acquire approximately 568 OneComm authorizations,[47] many of which are concentrated in the Pacific Northwest.[48] Nextel's present system overlaps with OneComm's system in relatively few markets.[49] If the Dial Page and Motorola transactions are also approved and consummated, Nextel will control more 800 MHz SMR channels in the United States than any other single company.[50]

24. Opponents of the Nextel/OneComm transaction vociferously complain that Nextel's acquisition of such a large percentage of 800 MHz SMR spectrum will prevent independent operators from being able to expand their systems and will result in increased prices, a reduction in the quality of service, and employee layoffs.[51] Clark's assertions are based on the premise that thep 3800 MHz SMR market is a discrete product market that offers a low-cost alternative to cellular.[52] These independent SMR operators conclude that Nextel's dominance of the 800 MHz SMR market will eventually squeeze them out of business.[53] OneComm, Nextel, and Motorola, on the other hand, argue that Nextel's nation-wide network will increase competition within the wireless marketplace as a whole.[54]

25. *Discussion.* When examining a transfer of control under the public interest standard of Section 310(d) of the Communications Act, we consider the effect of the transfer on competition. We agree with OneComm, Nextel, and Motorola that Nextel's network, if successful, will foster overall competition in the flourishing CMRS marketplace. Increased competition throughout the broader CMRS market serves the public interest because it promotes technological innovation and acts as a check on price increases.

26. In the *CMRS Third Report and Order,* the Commission conducted an extensive market analysis of CMRS services to determine how best to protect and encourage competition among mobile service providers.[55] The Commission determined that all CMRS services -- including paging, SMR, PCS, and cellular -- are actual or potential competitors with one another, and should therefore be

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[42] *See United States v. FCC,* 652 F.2d 72, 104 (D.C. Cir. 1980) (en banc) (". . . the Commission's overriding responsibility is not to foster the maximum level of competition in the industry it oversees, but to promote the public interest.")

[43] Clark Comments at 5. *See also* discussion at ¶ ¶ 42-44, *infra.*

[44] Clark Petition for Special Relief at 6; ICLP Comments at 5.

[45] OneComm Opposition to Petition for Special Relief at 12. *See* Co-Channel Protection Criteria for Part 90, FCC 93-450, 8 FCC Rcd. 7293 n.1 (1993).

[46] OneComm Opposition to Clark Petition for Special Relief at 12.

[47] *See* OneComm Form 173 (filed Aug. 12, 1994) and amendment (filed Nov. 3, 1994).

[48] OneComm licenses and pending applications are located in the following states: Arizona, Colorado, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Minnesota, Missouri, Nebraska, Ohio, Oklahoma, Oregon, Pennsylvania, South Dakota, Texas, Utah, Washington, Wisconsin, and Wyoming.

[49] *See ex parte* Letter from Lawrence R. Krevor to David L. Furth, Deputy Chief, Commercial Radio Division, filed by Nextel (Jan.26, 1995) ("Krevor Letter"). Nextel is currently licensed on fewer than 20 channels in 40 out of 67 markets involved in the OneComm transfer.

[50] CIS at 9.

[51] Clark DOJ Comments at ii.

[52] *Id.* at 14.

[53] Clark Comments at 2.

[54] Motorola DOJ Comments at 8; Nextel Reply Comments at 17; OneComm DOJ Comments at 3.

[55] *CMRS Third Report and Order,* 9 FCC Rcd 8009, ¶ 37 *et seq.*

regarded as substantially similar for regulatory purposes.[56] In addition, to prevent CMRS providers from restricting competition by aggregating spectrum, the Commission established a 45 MHz cap for combined PCS, cellular, and SMR licenses classified as CMRS in which an entity may have an attributable interest in any geographic area at any point in time.[57] The Commission determined, however, that more stringent limitations on aggregation of SMR spectrum were unnecessary to ensure a competitive CMRS market.

27. Given the Commission's analysis in the *CMRS Third Report and Order*, we conclude that Nextel's acquisition of OneComm is pro-competitive. The Commission views 800 MHz SMR as just one of many competitive services within the larger CMRS marketplace. Even after the OneComm transfer, Nextel's holdings will be well within the Commission's 45 MHz spectrum cap. In addition, because of the advent of new services and the anticipated deregulation of the cellular industry, Nextel will be forced to compete aggressively with many other providers.[58]

28. We also reject Clark's contention that the Nextel/OneComm merger would violate anti-trust principles. Application of these principles begins with an analysis of the relevant product market in which competition may be threatened.[59] Clark asserts that the relevant product market is limited to SMR service at 800 MHz.[60] OneComm, Nextel, and Motorola, on the other hand, argue for a product market consisting of mobile wireless services as a whole.[61] We find that the evidence presented herein supports the latter conclusion. Contrary to Clark's contentions, licensed 800 MHz SMR is not a self-contained market; rather, as we concluded in the *CMRS Third Report and Order*, SMR service is one of many competitive wireless services striving to meet the needs of consumers who desire mobile communications.[62] Although technical variations exist among wireless services, their functions frequently overlap with one another or functional overlap can be created easily with moderate investment. For example, SMRs have the flexibility to offer interconnected voice or non-interconnected dispatch services. Cellular and PCS providers also have substantial flexibility to offer a multiplicity of wireless services.[63] For consumers, this results in a wide array of competitive alternatives to choose from, regardless of the service in which a particular provider is licensed. Thus, we reject Clark's view that Nextel should not be viewed as competing with cellular unless it chooses to provide "cellular-like" service. Even if Nextel offers non-cellular services such as dispatch, the product market in which it competes includes cellular and PCS as well as other SMR providers.

29. In addition to determining the product market, antitrust analysis requires examination of the relevant geographic market in which competition potentially is affected by the transaction.[64] We received relatively little comment on the definition of the relevant geographic market. Clark states that it generally agrees with DOJ's definition of the geographic market as the area within a 25-mile radius of a particular city center.[65] We do not decide this issue, but accept Clark's definition for purposes of our analysis here. While a broader geographic market definition may be more appropriate (e.g. a Major Trading Area), our conclusion is not affected by this issue.

30. Based on the above market definitions, we find the Nextel/OneComm merger to be fully consistent with antitrust principles. We find unpersuasive the claims of opponents that the proposed acquisition will result in increased prices and a Preduction in the quality of service.[66] If Nextel increases prices and lowers the quality of service, it will lose business; the proposed merger cannot, on that ground, be deemed anti-competitive. Equally unpersuasive is the claim that the proposed merger will eventually squeeze small SMR systems out of business.[67] The Commission's priority is to protect competition, not competitors, for the benefit of consumers.[68]

31. In short, we find no evidence to support the view that competition in the mobile services market will be reduced by this merger. In fact, the merger will have relatively little effect on the concentration of SMR spectrum because Nextel's and OneComm's systems do not significantly overlap. For example, in nearly two thirds of the 67 markets in which OneComm holds licenses, Nextel is currently licensed on or controls fewer than 20 channels

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[56] *Id.* at ¶ 37.

[57] *Id.* at 8100, ¶ 238.

[58] *See Notice of Proposed Rule Making*, GN Docket No. 94-90, FCC 94-202, 59 Fed. Reg. 42,563 (Aug. 18, 1994).

[59] *United States v. Continental Can Co.*, 378 U.S. 441 (1964); *United States v. E.I. du Pont de Nemours & Co.*, 353 U.S. 586 (1957); *Standard Oil Co. v. United States*, 337 U.S. 293, 299-300 n.5 (1949). The relevant product market is the "line of commerce" within which a service or product is considered interchangeable with a reasonable substitute, given consideration of price, use, and quality. *Brown Shoe Co. v. United States*, 370 U.S. 294, 324-25 (1962); *United States v. FCC*, 652 F.2d 72, 97 (D.C. Cir. 1980); *General Electric Co.*, 4 FCC Rcd 8207, 8208-09 (1989). We also are guided in our analysis of the competitive effects of the proposed merger by the most recent Department of Justice - Federal Trade Commission Horizontal Merger Guidelines, 4 Trade Reg. Rep. (CCH) ¶ 13,104 at 20,571 (1992) (*"Guidelines"*).

[60] Clark DOJ Comments at 14.

[61] *See* Motorola DOJ Comments at 8; Nextel Reply Comments at 17; OneComm DOJ Comments at 3.

[62] *CMRS Third Report and Order*, 9 FCC Rcd at 8012, ¶ 43.

[63] Although cellular providers are currently prohibited from providing dispatch service, we have allowed cellular providers to provide dispatch-like services as long as they do not interfere with cellular service. *Report and Order*, Liberalization of Technology and Auxiliary Service Offerings in the Domestic Public Cellular Radio Telecommunications Service, 3 FCC Rcd 7033, ¶ 70. We have also proposed to eliminate the cellular dispatch prohibition to increase competition in dispatch services. *See Notice of Proposed Rule Making*, Eligibility for the Specialized Mobile Radio Services and Radio Services in the 220-222 MHz Band and Use of Radio Dispatch Communications, GN Docket No. 94-90, FCC 94-202, 59 Fed. Reg. 42,563 (Aug. 18, 1994).

[64] The geographic market is the area in which buyers can turn for alternative sources of supply, or in which there are sellers who act to restrain the prices charged to those buyers. *United States v. Philadelphia National Bank*, 374 U.S. 321, 359 (1963); *Common Carrier Services*, 95 F.C.C. 2d 554, 573 (1983), *rev'd on other grounds, AT&T v. FCC*, 978 F.2d 727 (D.C. Cir. 1992), *cert. denied*, 113 S. Ct. 3020 (1993).

[65] Clark Preliminary DOJ Comments at 3; *see also* CIS at 6.

[66] Clark DOJ Comments at ii.

[67] Clark Comments at 2.

[68] *Hawaiian Telephone Co. v. FCC*, 498 F. 2d 771, 776 (D.C. Cir. 1974) (FCC did not conform to public interest mandate in approving applications where it considered the factor of competition "not in terms primarily as to benefit the public but specifically with the objective of equalizing competition among competitors.")

prior to the merger.[69] Thus, the acquisition of OneComm's systems by Nextel in these markets will not materially reduce the availability of spectrum to other potential entrants.[70] More broadly, we agree with the applicants and Motorola that the proposed acquisition will have pro-competitive effects in the mobile telecommunications marketplace as a whole by promoting technological innovation and new or improved service offerings for consumers, and acting as a check on price increases by other SMRs and cellular carriers.[71]

32. We note that our analysis of the competitive impact of the Nextel/Onecomm merger differs from that of DOJ, which defined the relevant product market as consisting of trunked SMR service in the 800 MHz, 900 MHz, and 220 MHz bands.[72] Nevertheless, DOJ's Hanalysis also supports our conclusion. Despite its different definition of the product market, DOJ has approved Nextel's combined acquisition of OneComm, Dial Page, and Motorola subject only to certain restrictions affecting 900 MHz SMR[73] and the divestiture of forty-two 800 MHz channels in Atlanta after the Dial Page transaction is completed.[74] We agree with DOJ that the Nextel/OneComm merger can be supported on this basis, because Nextel will continue to face competition from 220 MHz, 800 MHz, and 900 MHz providers. We also disagree with Clark's argument that 220 MHz and 900 MHz SMR should be excluded from the relevant product market on the grounds that they are "unlicensed" services. Limiting the product market in this manner ignores the potential for new entry on frequencies that have not been licensed but are available for licensing.

33. Clark's real concern appears to be the lack of availability of new spectrum for its own growth requirements and those of similarly situated small SMR operators.[75] Clark ignores the fact, however, that the spectrum licensed to OneComm is already occupied and therefore unavailable to competing service providers. Hence, OneComm's transfer of control to Nextel will not exacerbate any spectrum shortage as Clark contends, nor will denial of OneComm's transfer application provide these entities with the spectrum they desire. The issue of spectrum availability raised by Clark is a serious one, which the Commission is already considering in the context of the 800 MHz SMR wide-area licensing proceeding.[76] The decisions made in that proceeding to alleviate spectrum scarcity, however, will apply equally regardless of whether OneComm or Nextel holds the licenses at issue here. Therefore, we see no reason to deny the OneComm transfer of control to Nextel on the basis of scarce spectrum.

B. Transfer of Unconstructed Licenses

34. *Background.* OneComm's application includes the proposed transfer of unconstructed SMR licenses to Nextel. Section 90.609 of the Commission's rules prohibits an applicant from assigning or transferring a license to operate a conventional or trunked radio system prior to the completion of construction of the facility.[77] Section 90.609 does not apply, however, to the transfer of unconstructed authorizations for low-power, digital stations that are *ancillary* to underlying constructed high-power analog SMR licenses if the analog system is being converted to a wide-area system.[78] Such authorizations for low-power base stations are not for unconstructed facilities in previously unserved areas; we consider them instead to be components of an existing system that is in the process of being reconfigured. Therefore, during the initial stages of a conversion, we grant *de facto* temporary frequency exclusivity to a licensee throughout its "footprint."[79] We have defined the footprint of a system as "the contiguous and overlapping service areas of stations that are (1) constructed and placed in operation, and (2) currently licensed to or managed by the applicant.[80] We emphasize that the licensee has already been granted exclusivity throughout its footprint, based on the area covered by its constructed and operating base stations.

35. In addition, the Commission's new rules, which went into effect on January 2, 1995, provide a limited exception to the prohibition against transferring unconstructed stations.[81] The *CMRS Third Report and Order* states that the transfer of unbuilt stations is permitted if the transfer is part of a *"bona fide* sale of an ongoing business to which the licenses are incidental."[82] The "incidental" exception is embodied in agency case law, which holds that such instances present little risk of speculation. Therefore, legitimate mergers or acquisitions should not be disrupted simply because the acquired company has 8an unbuilt facility.[83] Thus, to the extent that a licensee wants to transfer authorizations that are truly unconstructed -- *e.g.* their service contours extend beyond the licensee's existing footprint -- the licensee may be able to establish that the unconstructed authorizations are incidental to a larger merger or acquisition.

36. *Discussion.* We agree with OneComm and Nextel that established Bureau policy permits a licensee to transfer underlying unconstructed SMR licenses with service contours that do not extend beyond the footprint of the analog

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[69] *See* Krevor Letter, Attachment entitled "Number of Discrete Licensed Channels Within 25 Miles of the Top 320 U.S. Markets in the OneComm Operating Areas."

[70] *See Guidelines* at 20,573-5 to -6.

[71] Motorola DOJ Comments at 8; Nextel Reply Comments at 17; OneComm DOJ Comments at 3.

[72] DOJ does not include cellular telephone service in the same product market as SMR because cellular service has historically been more expensive to consumers and also because cellular providers have traditionally been prohibited from offering dispatch-type services. CIS at 6.

[73] Nextel and Motorola are restricted in the number of 900 MHz licenses they can hold in the following thirteen cities: Boston, Chicago, Dallas, Denver, Los Angeles, San Francisco, Miami, Orlando, New York, Philadelphia, Washington, D.C., Detroit, and Seattle. DOJ Proposed Final Judgment at 5.

[74] DOJ Proposed Final Judgment at 7.

[75] Clark Comments at 9.

[76] *Further Notice of Proposed Rule Making,* FCC 94-271, 59 Fed. Reg. 60,111 (Nov. 22, 1994).

[77] 47 C.F.R. § 90.609(b).

[78] Nextel Reply Comments at 8-9; OneComm Reply Comments at 11-12; *see, e.g.,* Sept. 27, 1993 letter from Chief, Private Radio Bureau to Gerald S. McGowan ("McGowan Letter").

[79] *See* Weisman Letter, *supra,* n. 2.

[80] *Id.*

[81] *See CMRS Third Report and Order,* 9 FCC Rcd at 8160, ¶ 393.

[82] *Id.*

[83] *See, e.g., Airsignal International, Inc.,* Memorandum Opinion and Order, 81 FCC 2d 472 (1980); *In re Applications of James F. Rill,* Memorandum Opinion and Order, FCC 86-251 (released May 27, 1986) (1986 WL 291785).

licenses with which they are affiliated.[84] In the past, for example, PRB has approved similar transfers of unconstructed wide-area SMR stations of Dispatch Communications, Powerfone, and Questar Telecom Communications to Dial Call.[85]

37. We agree with Clark, however, that OneComm has not provided us with enough information to determine whether the service contours of all of its authorizations for unconstructed facilities are contained within its footprint.[86] Earl's and Clark both claim that at least some of OneComm's authorizations extend beyond OneComm's footprint.[87] Nextel states that OneComm's authorizations, "with few exceptions," fall within its footprint.[88] OneComm asserts that none of its unconstructed authorizations extend beyond its existing footprint.[89] Thus, we approve the transfer of unconstructed authorizations with service contours contained within OneComm's existing footprint; however, we condition our approval on a showing by OneComm that the service contour for each unconstructed authorization does not extend beyond OneComm's existing footprint.

38. With respect to those unconstructed authorizations with service contours that extend beyond OneComm's footprint, OneComm may be permitted to transfer them to Nextel under the Commission's new rules if OneComm can establish that they are incidental to a larger transaction.[90] Clark argues that the transfer of such a large number of unconstructed channels cannotbe considered merely "incidental" to the OneComm/Nextel merger.[91] Again, OneComm has not provided us with enough information to enable us to draw any conclusions about whether it has any unconstructed authorizations outside of its footprint and, if so, whether they are incidental to a larger transaction.

39. Therefore, we require the following information from OneComm, within thirty (30) days of the release date of this Order, before we will approve the transfer of any authorizations for unconstructed stations: (1) documentation showing the location and service contour of each authorization for an unconstructed facility in relation to the operating analog base station with which it is affiliated; and (2) if any authorizations for unconstructed licenses have contours that extend beyond OneComm's existing footprint, a showing that they are incidental to a larger merger or acquisition.[92] Any authorizations for which a showing has not been made will cancel automatically.

C. Interoperability of Equipment

40. *Background.* E.F. Johnson requests that the Commission require interoperability between equipment intended for wide-area SMR service, so that Nextel's customers are able to employ equipment produced by manufacturers other than Motorola.[93] According to E.F. Johnson, Nextel requires its customers to use only MIRS equipment, which incorporates a proprietary closed signalling protocol.[94] E.F. Johnson asserts that Motorola is unwilling to license MIRS technology under commercially reasonable terms and conditions to other equipment manufacturers.[95] Furthermore, Clark asserts that OneComm's transfer of control to Nextel will increase the use of MIRS throughout the Pacific Northwest, further limiting the ability of other equipment manufacturers to compete.[96] Motorola and Nextel both claim that E.F. Johnson mischaracterizes their Agreement, which contains explicit open architecture provisions that will encourage the participation of alternative subscriber and infrastructure equipment manufacturers.[97] Motorola specifically states that it has already made a commitment to make MIRS proprietary technology available to other manufacturers on commercially reasonable terms and conditions.[98]

41. *Discussion.* We agree with Nextel that interoperability standards do not directly relate to OneComm's application for transfer of control to Nextel. The Commission recently considered the interoperability issue in the *CMRS Third Report and Order* and decided not to adopt interoperability standards for CMRS.[99] E.F. Johnson's request that we change this policy is a rule-making issue that should be addressed in the appropriate rule-making proceeding.[100] Our concern here is limited to whether the public interest is served by OneComm's transfer of control to Nextel. Because OneComm already employs MIRS technology, transfer of control to Nextel should not have a dramatic impact on the equipment manufacturing industry.[101] We therefore see no reason to deny or delay the merger on this basis.

D. Failure to Inform Commission of 1993 Letter of Intent

42. *Background.* Clark contends that OneComm violated Section 1.65 of the Commission's rules because it failed to inform the Commission of a prior proposed merger with OneComm that was not consummated. The transaction in question was initiated on October 18, 1993, when Nextel entered into a letter of intent with OneComm to transfer

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[84] OneComm Reply Comments at 7-8; Nextel Reply Comments at 6-7; *see also* McGowan Letter.

[85] *See* McGowan Letter, *supra.*

[86] Clark Comments at 5-6.

[87] Earl's Reply to OneComm Opposition at 2; Clark Reply to Opposition at 5-6.

[88] Nextel Reply Comments at 7.

[89] OneComm Opposition to Petition for Special Relief at 17 and Exhibit C.

[90] *See CMRS Third Report and Order,* 9 FCC Rcd at 8160, ¶ 393 and n.732.

[91] Clark Comments at 10.

[92] Note that the transfer of all licenses, constructed and unconstructed, is contingent upon notification from the parties that the underlying transaction has been consummated within 180 days of the release date of this Order.

[93] E.F. Johnson Comments at 5.

[94] *Id.* at 2.

[95] *Id.*

[96] Clark Comments at 8.

[97] Motorola Reply Comments at 4-5; Nextel Reply Comments at 20, n.39, citing "Agreement and Plan of Contribution and Merger Among Nextel Communications, Inc., Motorola, Inc., ESMR, Inc. and ESMR SUB, Inc." dated Aug. 4, 1994.

[98] Motorola Reply Comments at 5.

[99] *See CMRS T hird Report and Order,* 9 FCC Rcd at 8070, ¶ 167.

[100] In the *CMRS Third Report and Order,* the Commission indicated that it would initiate a rule-making proceeding on this issue. 9 FCC Rcd at 8070, ¶ 168.

[101] OneComm Opposition to Earl's at 4-5.

certain SMR assets in exchange for a minority interest in OneComm. Subsequently, the parties renegotiated the merger in the form that is now before us.

43. *Discussion.* We disagree with Clark that OneComm violated Section 1.65 of the Commission's rules by failing to report to the Commission the proposed transfer of control to Nextel within thirty days of entering into the letter of intent.[102] Thegeneral rule, as stated in Section 1.65, requires applicants to apprise the Commission of material changes affecting their pending applications.[103] Section 1.65 provides in relevant part:

> [e]ach applicant is responsible for the continuing accuracy and completeness of information furnished in a pending application . . . whenever there has been a substantial change as to any . . . matter which may be of decisional significance in a Commission proceeding involving the pending application . . . .[104]

This rule does not require parties to notify the Commission of a proposed transaction that is still being negotiated.

44. As Nextel asserts, the letter's terms and agreements were never finalized because the October 18, 1993 proposed agreement was abandoned in favor of a different transaction entered into on July 13, 1994.[105] Under the proposed 1993 deal, Nextel planned to transfer SMR assets to OneComm.[106] Under the 1994 deal, OneComm is transferring control of its corporate entity to Nextel and becoming a wholly-owned subsidiary. Even if the two deals were identical, the parties had no obligation to report a change until after the deal was fully negotiated and ready to be consummated. Standing alone, the letter of intent is not information of "decisional significance" to the Commission, because it neither changed the status of OneComm nor transferred control of OneComm facilities to Nextel.

VI. ORDERING CLAUSES

45. Accordingly, IT IS ORDERED that OneComm's application seeking consent to transfer control to Nextel is GRANTED to the extent described herein and DENIED in all other respects.

46. IT IS FURTHER ORDERED that OneComm has thirty (30) days from the release date of this Order to make the showings discussed in ¶ 39.

47. IT IS FURTHER ORDERED that OneComm and Nextel have one-hundred eighty days (180) days from the release date of this Order to provide notification that the underlying transaction has been consummated.

FEDERAL COMMUNICATIONS COMMISSION

Regina M. Keeney
Chief, Wireless Telecommunications Bureau

Appendix A

TRANSFER OF CONTROL

Comments

October 18, 1994

Opposition Comments filed by Clark's Electronics, Teton Communications, Radio Service Company, Zundel's Radio, Business Radio, and Accu Comm ("Clark Comments")

E.F. Johnson Company ("E.F. Johnson Comments")

Kentec Communications, Inc. and Pro-Tec Mobile Communications, Inc., filing jointly Motion For Extension of Time ("Kentec Motion")

Pittencrieff Communications, Inc. ("Pittencrieff Comments")

Reply Comments

October 25, 1994

Motorola, Incorporated ("Motorola Reply Comments")

Nextel Communications, Incorporated ("Nextel Reply Comments")

OneComm Corporation ("OneComm Reply Comments")

Amendment of Transfer of Control Application of C-Call Corp.

November 3, 1994

Nextel ("Nextel Amendment")

Proposed Final Judgment Between the United States, Motorola, and Nextel

November 3, 1994

Motorola ("DOJ Proposed Final Judgment")

Additional Comments

November 21, 1994

Motorola ("Motorola DOJ Comments")

OneComm ("OneComm DOJ Comments")

Late-Filed Comments

November 30, 1994

Clark, Motion to Accept Pleading; Preliminary Comments on Proposed Antitrust Final Judgment ("Clark Preliminary DOJ Comments")

December 7, 1994

Motorola, Opposition to Motion to Accept Pleading

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[102] Clark Comments at 5.
[103] 47 C.F.R. § 1.65.
[104] *Id.; see, e.g., Southern Broadcasting Co.*, 38 FCC 2d 461, 464 (Rev. Bd. 1972).
[105] Nextel Reply Comments at 4-5.
[106] *Id.* at 3-4.

December 9, 1994

OneComm, Opposition and Motion to Strike Motion to Accept Pleading

December 14, 1994

Clark, Additional Comments on Proposed Antitrust Final Judgment ("Clark DOJ Comments")

December 20, 1994

Clark, Opposition to OneComm's Motion to Strike

January 23, 1995

Clark, Response to OneComm's Supplement to its December 9, 1994 Opposition and Motion to Strike Clark's Comments

Motion to Consolidate Actions

January 13, 1995

Clark Motion to Consolidate Actions

January 20, 1995

Nextel Reply Comments (DA 94-1567)

Motorola Opposition to Motion to Consolidate Actions (DA 94-1567)

February 1, 1995

Clark Reply to Oppositions of Motorola and OneComm to Clarks' Motion to Consolidate Actions

***Ex Parte* Filing**

January 26, 1995

Nextel ("Nextel *ex parte*")

PETITIONS TO RESCIND ONECOMM AUTHORIZATIONS

Petitions

October 7, 1994

Earl's Distributing Inc. and Earl's Wireless Communications ("Earl's Petition")

October 18, 1994

Clark, *et al.*, Petition for Special Relief and Comments Requesting Rescission of SMR Authorizations Issued to OneComm ("Clark Petition")

November 18, 1994

Idaho Communications Limited Partnership and Radio Service Company, filing jointly, Petition for Reconsideration ("ICLP Petition")

Opposition to Petitions

October 20, 1994

OneComm Opposition to Earl's Petition for Reconsideration ("OneComm Opposition to Earl's")

November 2, 1994

OneComm Opposition to Clark Petition for Special Relief ("OneComm Opposition Clark")

January 11, 1995

OneComm Letter to Rosalind K. Allen Re: ICLP Petition for Reconsideration

Reply to OneComm Opposition

October 28, 1994

Earl's Distributing Company, Inc. Reply to OneComm Opposition to Petition for Reconsideration ("Earl's Reply to OneComm Opposition")

November 21, 1994

Clark Reply to Opposition to Petition for Reconsideration ("Clark Reply to OneComm Opposition")

January 24, 1995

ICLP Opposition to OneComm's Informal Response to Petition for Reconsideration (ICLP Reply to OneComm Opposition")

Appendix B

Commission Documents Issued In This Proceeding

Public Notice, DA 94-1087, "Private Radio Bureau Seeks Comments on OneComm Corporation's Request For Commission Consent to Transfer Control to Nextel Communications, Inc." October 3, 1994.

Public Notice, DA 94-1256, "Private Radio Bureau Seeks Further Comment on OneComm Corporation's Request for Commission Consent to Transfer Control to Nextel Communications, Inc." November 14, 1994.

Order, DA 94-1185, Denying Motion for Extension of Time filed by Kentec Communications, Inc., *et al.*, October 21, 1994.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

WB CABLE ASSOCIATES, LTD.

Petition for Revocation

of the City of Boca Raton's
Certification to Regulate
Basic Cable Service Rates
(FL0278)

MEMORANDUM OPINION AND ORDER

Adopted: February 17, 1995; Released: February 21, 1995

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. On December 29, 1994, WB Cable Associates, Ltd. d/b/a West Boca Cablevision ("West Boca") filed a petition for revocation challenging the certification of the City of Boca Raton ("Boca Raton" or "the City") to regulate West Boca's rates for basic cable service and associated equipment.[1] In its petition, West Boca alleges that its cable system serving the City is subject to effective competition. The City has not filed an opposition to West Boca's petition.[2]

2. Section 623 (a)(4) of the Communications Act of 1934, as amended, allows franchising authorities to become certified to regulate the basic cable service rates of cable systems that are not subject to effective competition.[3] For the purposes of the initial request for certification, local franchising authorities may rely on a presumption that cable operators within their jurisdiction are not subject to effective competition, unless they have actual knowledge to the contrary.[4] Certification becomes effective 30 days from the date of filing unless the Commission finds that the franchising authority does not meet the statutory certification requirements.[5] Cable operators may file petitions for reconsideration of the franchising authority's certification within 30 days from the date such certification becomes effective.[6] Rate regulation is automatically stayed pending review of a timely-filed petition for reconsideration (filed pursuant to Section 76.911 of the Commission's rules) alleging the presence of effective competition.[7] After the 30-day deadline for filing petitions for reconsideration has elapsed, cable operators may challenge a franchising authority's certification by filing a petition for revocation.[8] However, regardless of its grounds, the filing of a petition for revocation does not automatically trigger a stay of a franchising authority's power to regulate basic cable rates.[9]

3. On December 13, 1993, West Boca filed a petition for reconsideration challenging the City's certification. In that petition, West Boca alleged that its cable system serving Boca Raton, its franchise area, was subject to effective competition because its system served fewer than 30% of the households in the franchise area.[10] To support its claim, West Boca submitted evidence indicating that its system served 198 subscribers in a franchise area consisting of 33,134 "existing dwelling units."[11] By using these figures, the ratio of total West Boca subscribers in relation to the total number of homes in the franchise area yielded a subscriber penetration rate of less than 1%. Because this number was less than 30%, West Boca argued that its system should be exempt from rate regulation and that the City's certification to regulate West Boca's basic rates and associated equipment should be rescinded.

4. In a *Memorandum Opinion and Order* (*"Order"*), the Bureau denied West Boca's petition because West Boca submitted no evidence clarifying whether its use of "existing dwelling units" excluded vacant housing units.[12] As the Bureau explained, in order to demonstrate the presence of effective competition, our rules require the use of data reflecting the number of households (i.e., occupied housing

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[1] Boca Raton filed its "Certification of Franchising Authority to Regulate Basic Cable Service Rates and Initial Finding of Lack of Effective Competition" ("FCC Form 328") with the Commission on October 18, 1993. Certification became effective on November 17, 1993.

[2] Section 76.914 of the Commission's rules allows franchising authorities 30 days from the date of filing of a petition for revocation to file an opposition.47 C.F.R. § 76.914.

[3] Communications Act of 1934 § 623(a)(4), 47 U.S.C. § 543(a)(4).

[4] 47 C.F.R. §§ 76.906, 76.910(b)(4).

[5] 47 C.F.R. § 76.910(e). Certification becomes effective unless the Commission determines that: (1) the franchising authority will not adopt or administer rate regulations that are consistent with the Commission's regulations; (2) the franchising authority lacks the legal authority to adopt, or the personnel to administer, rate regulations; (3) procedural laws and regulations applicable to rate regulation proceedings by the franchising authority do not provide a reasonable opportunity for consideration of the views of interested parties; or (4) the cable system in question is subject to effective competition.47 C.F.R. § 76.910(b). *See also* Communications Act of 1934 § 623(a)(4), 47 U.S.C. § 543(a)(4).

[6] 47 C.F.R. §§ 1.106, 76.911; *Report and Order and Further Notice of Proposed Rulemaking*, MM Docket No. 92-266, 8 FCC Rcd 5631, 5693 (1993).

[7] 47 C.F.R. § 76.911(c).

[8] 47 C.F.R. § 76.914.

[9] 47 C.F.R. § 76.914(d).

[10] The 1992 Cable Act (Communications Act of 1934 § 623(a)(2), 47 U.S.C. § 543(a)(2) and the Commission's rules (47 C.F.R. § 76.905(a)) provide that only the rates of cable systems that are not subject to effective competition may be regulated. One of the bases by which a cable operator will be deemed subject to effective competition is if fewer than 30 percent of the households in the system's franchise area subscribe to the system's service. Communications Act of 1934 § 623(l)(1)(A), 47 U.S.C. § 543(l)(1)(A); 47 C.F.R. § 76.905(b)(1).

[11] West Boca referred to "households" in its petition and "existing dwelling units" in the affidavit submitted as supporting documentation. Thus, it was unclear as to which it relied upon in support of its effective competition claim.

[12] *WB Cable Associates, Ltd.*, DA 94-1458 (released 1994) (*"West Boca Order"*).

units) in the franchise area.[13] Because West Boca failed to submit evidence demonstrating that its effective competition claim was based on "households," the Bureau rejected West Boca's petition.[14] As a result, the automatic stay imposed on the City's certification to regulate rates was terminated and West Boca was ordered to file the applicable rate justifications with the City of Boca Raton. The Bureau, however, invited West Boca to file a petition for revocation "[s]hould West Boca wish to submit more specific information sufficient to demonstrate the presence of effective competition."[15]

II. DISCUSSION

5. In its petition for revocation, West Boca states that it serves 223 of the 26,297 households (i.e., occupied housing units) in its franchise area. This yields a penetration level of less than 1%. As support, it submits 1990 Census data[16] which shows that there are 26,297 households in Boca Raton. West Boca also submits a computer print-out with sufficient subscriber information to support its claim that it serves 223 subscribers in the franchise area. West Boca now argues that when using occupied housing unit data, its subscriber penetration level still remains below 30% in its franchise area. Specifically, dividing 26,297 total households (that is, occupied housing units) by West Boca's subscriber figure of 223 yields a subscriber penetration rate of less than 1%. As such, West Boca argues that its system is not subject to regulation by the City of Boca Raton.

6. In the absence of a demonstration to the contrary, cable systems are presumed not to be subject to effective competition.[17] The cable operator bears the burden of rebutting the presumption that effective competition does not exist with evidence that effective competition, as defined by Section 76.905 of the Commission's rules, is present within its franchise area.[18] West Boca has met this burden. Specifically, West Boca appropriately relied on data reflecting the number of households (i.e., "occupied housing units") as required by our rules.[19] According to this data, there are 26,297 occupied housing units in its franchise area. A comparison of West Boca subscribers in relation to the total number of households in West Boca's franchise area yields a subscriber penetration level of less than 1%. Thus, we find that West Boca's system serving the City of Boca Raton is subject to effective competition. Accordingly, its petition is granted.

III. ORDERING CLAUSES

7. Accordingly, IT IS ORDERED that the petition for revocation filed by WB Cable Associates, Ltd. challenging the certification of the City of Boca Raton to regulate WB Cable Associates, Ltd.'s basic cable rates IS GRANTED.

8. IT IS FURTHER ORDERED that the certification of the City of Boca Raton to regulate West Boca's basic cable service rates IS RESCINDED.

9. This action is taken pursuant to delegated authority under Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

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[13] *See Third Order on Reconsideration*, in MM Docket Nos. 92-266 and 92-262, 9 FCC Rcd 4316, 4324 (1994) (*"Third Recon. Order"*).

[14] *Id.* As the Commission stated in the *Third Recon. Order*, "[a]s used in the Cable Act, we presume that Congress did not intend 'households' to have a different meaning than in the 1990 Census that would include vacant units or even partial year vacant units." *Id.* The term "household" is defined for purposes of the 1990 Census data as "all persons who occupy a housing unit." Bureau of the Census, U.S. Dept. of Commerce, 1990 Census of Population, CP-1-1B, Appendix B at B-8. Thus, the term "household" reflects only occupied housing units.

[15] *See West Boca Order*, at n.10.

[16] As the Bureau stated recently, 1990 Census data is an appropriate source for household data. *Cable Operator's Petitions for Reconsideration and Revocation of Franchising Authorities' Certifications to Regulate Basic Cable Service Rates*, 9 FCC Rcd 3656 (1994) (*"Effective Competition Order"*).

[17] 47 C.F.R. § 76.906.

[18] 47 C.F.R. § 76.911(b)(1).

[19] *Third Recon. Order, supra.*

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Cable Television Associates
of Georgia, et al.
Complainants, P.A. No. 95-007

v.

BellSouth Telecommunications, Inc.
Respondent

ORDER GRANTING EXTENSION OF TIME

Adopted: February 1, 1995; Released: February 1, 1995

1. BellSouth Telecommunications, Inc., ("BellSouth") has filed a motion for a thirty day extension of time in which to file its response to the above-captioned pole attachments complaint. Complainant Cable Television Association of Georgia ("Association") filed its complaint with the Commission on December 30, 1994. Because of the long holiday weekend, BellSouth did not receive its service copy of the complaint until January 3, 1995. Under the Commission's Rules, 47 C.F.R. §1.1407, BellSouth has 30 days from the date the complaint was filed with the Commission to file its response.

2. BellSouth states that it and the complainant, Association, have been involved in negotiations, which, if successful, will settle all disputed matters in this proceeding to the satisfaction of all parties. Therefore, BellSouth is requesting an additional 30 days to file its response so that the parties may continue to pursue a settlement. BellSouth further states that the Association has consented to the extension of time.

3. Under the Commission's Rules, 47 C.F.R. §1.46(a), it is the policy of the Commission that extensions of time shall not be routinely granted. However in this instance, by granting the motion for an extension of time, a settlement may be reached that would serve the public interest by eliminating the need for further litigation and the expenditure of further time and resources by the Commission and the parties. After careful consideration, we have decided to grant BellSouth's request for an extension of time until March 1, 1995.

4. Accordingly, IT IS ORDERED, pursuant to Sections 0.91 and 0.291 of the Commission's Rules, 47 C.F.R. §§0.91 and 0.291, that BellSouth's motion for an extension of time is hereby GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Kenneth P. Moran
Chief, Accounting and Audits Division

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

US West Communications, Inc., AAD 93-93
Copper Valley Telephone, Inc.,
Midvale Telephone Exchange, and
Table Top Telephone Company

Joint Petition for Waiver of the
Definition of "Study Area" Contained
in Part 36, Appendix-Glossary
of the Commission's Rules

and

Copper Valley Telephone, Inc.,
Midvale Telephone Exchange, and
Table Top Telephone Company

Petition for Waiver of Section 61.41(c)
of the Commission's Rules

MEMORANDUM OPINION AND ORDER

Adopted: February 17, 1995; Released: February 21, 1995

By the Chief, Accounting and Audits Division:

I. INTRODUCTION

1. On July 23, 1993, US West Communications, Inc. ("US West"), Copper Valley Telephone, Inc. ("Copper Valley"), Midvale Telephone Exchange ("Midvale"), and Table Top Telephone Company ("Table Top") (collectively, "Petitioners") filed a joint petition for waiver ("Joint Petition") of the definition of "study area" as set forth in the Appendix-Glossary of Part 36 of the Commission's rules. That definition constitutes a rule freezing all study area boundaries. The requested waiver would allow US West to consummate the sale of 11 telephone exchanges. US West proposes to sell four exchanges to Copper Valley, one exchange to Midvale and six exchanges to Table Top. In addition, Copper Valley, Midvale, and Table Top (collectively, "the Independents") seek a waiver of the Commission's price cap rules contained in Section 61.41(c) to exempt them from the requirement that non-price cap companies become subject to price cap regulation after acquiring a price cap company or any part thereof.

2. On August 4, 1993, the Common Carrier Bureau ("Bureau") released a public notice soliciting comments on the Joint Petition.[1] The Bureau received comments from three parties and reply comments from three parties.[2] At the request of Bureau staff, Petitioners provided additional information concerning the Joint Petition.[3] On September 1, 1994, the Arizona Corporation Commission ("Arizona Commission") issued an order approving the transfer of ten of the 11 exchanges.[4] With regard to the eleventh exchange, the Arizona Commission stated that it had issued a Procedural Order directing US West to delete from its application the request for approval of the sale of the San Carlos exchange to Table Top.[5] US West states that it has not yet completed its negotiations with the San Carlos Apache Tribe for the transfer of that exchange and, thus, is withdrawing the request for Commission approval of that transfer.[6] Accordingly, that transfer is excluded from consideration in this order. We find that allowing US West to consummate the three separate proposed sales of a total of ten Arizona exchanges to Copper Valley, Midvale, and Table Top will serve the public interest. We therefore grant the Petitioners' Joint Petition for waiver, as explained more fully herein.

II. STUDY AREA WAIVER

Background

3. A study area is a geographical segment of a carrier's telephone operations. Generally, a study area corresponds to a carrier's entire service territory within a state. Thus, carriers operating in more than one state typically have one study area for each state, and carriers operating in a single state typically have a single study area. Carriers perform jurisdictional separations at the study area level.[7] For jurisdictional separations purposes, the Commission adopted a rule freezing study area boundaries effective November 15, 1984.[8] The Commission took that action, in part, to ensure that local exchange carriers ("LECs") do

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[1] Public Notice, 9 FCC Rcd 2318 (Com. Car. Bur. 1993).

[2] Comments were filed on September 7, 1993, by the American Telephone and Telegraph Company ("AT&T"), the National Exchange Carrier Association, Inc. ("NECA"), and the United States Telephone Association ("USTA"). Reply comments were filed on September 28, 1993, by the Independents, the National Telephone Cooperative Association ("NTCA") and US West.

[3] Letter from Michael Crumling, US West, to William Caton, Acting Secretary, FCC, dated Oct. 1, 1993 ("Oct. 1 Supplement"). Letter from Ray Hendershot, GVNW Inc., to Adrian Wright, Accounting and Audits Division, FCC, dated Oct. 19, 1994 ("Oct. 19 Supplement"). Letter from Stephen Kraskin, on behalf of Copper Valley, to Adrian Wright, Accounting and Audits Division, FCC, dated Oct. 24, 1994 ("Copper Valley letter"). Letter from Margaret Nyland, on behalf of the Independents, to Office of the Secretary, FCC, dated February 14, 1995.

[4] Arizona Corporation Commission Order Docket Nos. E-1051-93-189, U-2727-93-189, E-1051-93-190, and U-2532-93-190 (1994)("Arizona Commission Order").

[5] *See* Arizona Commission Order at 6.

[6] Letter from M. Crumling, US West to K. Moran, Chief, Accounting and Audits Division, FCC, dated Sept. 16, 1994.

[7] The phrase "jurisdictional separations," or "separations," refers to the process of dividing costs, revenues, and expenses between a carrier's state and interstate operations. *See generally* 47 C.F.R. §§ 36.1 - 36.741.

[8] 47 C.F.R., Part 36, Appendix-Glossary, definition of "Study Area" (1993). *See* MTS and WATS Market Structure, Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board, CC Docket Nos. 78-72 and 80-286, 49 Fed. Reg. 48325 (Dec. 12, 1984) (*1984 Joint Board Recommendation*), adopted by the Commission, 50 Fed. Reg. 939 (Jan. 8, 1985) (*1985 Order Adopting Recommendations*). *See also* Amendment

not set up high-cost exchanges within their existing service territories as separate study areas to maximize high-cost support.[9] The study area freeze also prevents LECs from decomposing, and recombining, study areas to increase interstate revenue requirements and exchange carrier compensation. A LEC must apply to the Commission for a waiver of that rule if the LEC wishes to sell an exchange to another carrier, because such a transaction would have the effect of changing the study area boundaries.[10]

4. Waiver of commission rules is appropriate only if special circumstances warrant a deviation from the general rule[11] and such deviation will serve the public interest.[12] In evaluating petitions seeking a waiver of the rule freezing study area boundaries, the Commission employs a three-prong standard: first, that the change does not adversely affect the Universal Service Fund ("USF") support program; second, that the state commission(s) having regulatory authority does not object to the change; and third, that the public interest supports the change.[13] In evaluating whether grant of a waiver request would adversely affect the USF,[14] the Commission applies a "one percent" guideline to study area waiver requests filed after January 5, 1995.[15] This guideline does not apply in the instant case because Petitioners filed before that date.

Petition and Comments

5. US West seeks a waiver of the rule freezing study area boundaries to enable it to remove ten exchanges with approximately 12,000 access lines from its Arizona study area.[16] Midvale, a LEC providing service in Arizona, seeks a similar waiver to add one exchange with approximately 200 access lines into its existing study area. Finally, Copper Valley and Table Top, which are new LECs that will be providing service in Arizona, seek a waiver to establish two new study areas for the acquired exchanges. Copper Valley would acquire four exchanges with approximately 4,000 access lines and Table Top would acquire five exchanges with approximately 7,700 access lines.

6. Petitioners claim their request is consistent with the original purposes of the USF and that the transfer of the ten exchanges will not adversely affect the USF in any material way. The ten sale exchanges currently receive no USF support, Petitioners state, because US West's average study area cost per loop in Arizona is below the established national eligibility threshold for USF support.[17] Petitioners estimate that, if the waiver were granted, the transfer of the ten exchanges would not cause US West's remaining study area to draw USF support but would result in an initial net increase of $210,800 in USF support for the Independents. Specifically, Table Top estimates that the initial USF draw for its newly created study area would be $219,300 as a result of its acquisition and upgrade of the five exchanges. Midvale estimates that its annual USF draw would decrease by $8,500 (from $71,400 to $62,900) as a result of its acquisition and upgrade of the one exchange.[18] Hence, the estimated initial increase of $210,800 in USF support for the Independents as a group is the net effect of an increase of $219,300 for Table Top and a decrease of $8,500 for Midvale. Petitioners submit that Table Top and Midvale would be entitled to USF support because they would be acquiring additional high-cost loops but that Copper Valley would not be eligible to receive such support.[19]

7. Petitioners assert that the waiver would serve the public interest because service to the ten exchanges will be improved due to economies and resources available to the Independents.[20] The Independents state that they are committed to providing customers with high quality service, including state-of-the-art telecommunications capabilities. In particular, the Independents state that they plan to

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of Part 36 of the Commission's Rules and Establishment of a Joint Board, CC Docket No. 80-286, Notice of Proposed Rulemaking, 5 FCC Rcd 5974 (1990) (*Study Area Notice*).

[9] *See 1985 Order Adopting Recommendations,* 50 Fed. Reg. 939, 940. *Also see 1984 Joint Board Recommendation,* 49 Fed. Reg. 48325, 48337.

[10] 47 C.F.R. Part 36, Appendix-Glossary. *See also* 47 C.F.R. § 1.3.

[11] *Northeast Cellular Telephone Company v. FCC,* 897 F.2d 1164, 1166 (D.C. Cir 1990).

[12] *WAIT Radio v. FCC,* 418 F.2d 1153, 1159 (D.C. Cir 1969).

[13] *See* US West Communication, Inc., and Eagle Telecommunications, Inc., Joint Petition for Waiver of the Definition of "Study Area" Contained in Part 36, Appendix-Glossary of the Commission's Rules, *Memorandum Opinion and Order,* FCC 95-4, released Jan.5 , 1995, (*US West-Eagle Study Area Order)* at para. 5.

[14] *See Joint Board Recommended Decision,* 49 Fed. Reg. at 48337, para. 65. The Commission created the USF to preserve and promote universal service. *See* Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board, 96 FCC 2d 781 (1984). The USF allows LECs with high local loop plant costs to allocate a portion of those costs to the interstate jurisdiction, thus enabling the states to establish lower local exchange rates in those areas. To qualify for USF support, a LEC's total company unseparated loop costs must exceed 115 percent of the nationwide average of such costs. *See* 47 C.F.R. § 36.631.

[15] The Commission stated that no waiver of the rule freezing study area boundaries should result in an annual aggregate shift in USF assistance in an amount equal to or greater than one percent of the total USF, unless the parties can demonstrate extraordinary public interest benefit. The USF effect for the year must be computed on an annualized basis. To prevent carriers from evading this limitation by disaggregating a single large sale of exchanges into a series of smaller transactions that in the aggregate have the same effect on the USF, the Commission further requires that the "one percent" guideline be applied to all study area waivers granted to either carrier, as a purchaser or seller, pending completion of the current review of the USF program. In this context, the Commission defines the term "carrier" to include all affiliated carriers *(i.e.,* those carriers that are in common control, as the term "control" is defined in Section 32.9000 of the Commission's rules, 47 C.F.R. § 32.9000). *See US West-Eagle Study Area Order* at paras. 14-17.

[16] US West states that it will make a permanent downward adjustment to its price cap indices to reflect the sale of these exchanges. Letter from Lawrence Sarjeant to Kathleen Wallman, Chief, Common Carrier Bureau, FCC, dated January 24, 1995 ("US West Letter").

[17] USF support is based on the average cost per loop in the study area, compared to the national average cost per loop. The study area cost per loop must be at least 115% of the national average cost per loop in order to qualify for USF support. Given that the national average cost per loop is currently $239, the eligibility threshold for USF support is now $275 (*i.e,* 115 percent of $239). *See* 47 C.F.R. § 36.63. *Also see* NECA 1993 USF Report, Section 1, at 3.

[18] *Id.* at Attachment MT-1.

[19] Joint Petition at 4-5.

[20] *Id.* at 4.

replace central office switches with modern digital technology; upgrade multi-party service to one-party service; and provide service to areas not now served.[21]

8. NECA and USTA support the Petitioners' request and urge the Bureau to grant the waivers expeditiously. AT&T, however, expresses concern regarding the increasing number and magnitude of LEC requests for study area waivers. AT&T states that waiver requests have been spurred by the aggressive efforts of price cap LECs to divest themselves of high-cost rural exchanges. It was this concern, AT&T explains, that led it to file a petition to establish additional standards for evaluating study area waiver requests.[22] AT&T believes that, if the requested waiver is granted, it should be conditioned on the Independents' agreement to cap their added USF subsidies at 1994 levels, regardless of any planned service upgrades, through at least 1997.[23]

9. In reply to AT&T's comments, the Independents state that the imposition of additional requirements on them, in exchange for the grant of a justified waiver request, would violate both fairness and due process.[24] Petitioners submit that a cap on their levels of USF support, as AT&T proposes, would be anathema to the Commission's rules and would disserve the public.[25] US West claims that AT&T's proposed conditions cannot be reconciled with the facts and current Commission rules and cannot be implemented without violating the Administrative Procedure Act.[26]

Discussion

10. *Application of three-prong standard.* Petitioners' proposals demonstrate that current and potential customers in the affected exchanges likely will be better served by the Independents than by US West. The Independents state that they intend to upgrade central office switches to digital technology and replace pole-mounted cables with buried cables. These changes should result in improved service and an extension of service to remote areas not currently served. We thus believe the transfer of the ten exchanges, which has been approved by the Arizona Commission, likely will serve the public interest. In addition, we believe the initial net increase of $210,800 in the Independents' draw from the USF fund will not, in the overall context of these transactions, have a significant adverse effect on the USF at this point in time. Offset against that increase in USF support is the reduction in interstate revenue requirements of US West's price cap indices that will result from its transfer of the ten exchanges to the Independents.[27] We therefore find that the three existing criteria for granting a study area waiver have been met in this case and that the waiver request should be granted.

11. Although we find no reason to question Petitioners' estimates of the USF impact, we nonetheless are concerned that their estimates may later prove inaccurate. In several past cases, the actual USF impact has risen far above the amount petitioners estimated when seeking study area waivers.[28] Moreover, we share AT&T's concern that these sales and a number of similar proposed transactions might, in the aggregate, have a substantial effect on the size of the USF and on those high-cost LECs that draw from the USF.

12. This concern has been mitigated, in the short term at least, by the Commission's recent adoption of the Joint Board's recommendation for an indexed cap on the USF for the next 12 months.[29] Yet, even in the short term, unidentified errors contained in Petitioners' impact estimates may adversely affect the fund's distribution, if not its size. Under the indexed USF cap rules, any study area reconfiguration that increases the USF draw of one USF recipient reduces that of other USF recipients. Hence, if Petitioners' estimates prove to be too low, the support provided to other USF recipients could be lowered by an amount that does have a material impact. We therefore find that the waiver should be subject to the condition that the annual USF support provided to each of the study areas affected by the exchange transfers shall not exceed the estimates of the initial post-transfer amounts submitted by Petitioners in the Joint Petition and October 19 Supplement.

13. Another aspect of Petitioners' study area requests warrants discussion. Petitioners propose to establish a new study area for the four exchanges transferred to Copper Valley, a wholly-owned subsidiary of Valley Telephone Cooperative, Inc. ("Valley") which is already providing service in Arizona. Copper Valley argues that the exchanges should not be consolidated with Valley's existing study area because the exchanges are separated geographically and demographically from Valley's existing telephone operations. Copper Valley further argues that Valley considers this transaction a strategic business investment which is separate and distinct from its other telephone operations in Arizona.[30]

14. We do not oppose Valley's plans to create a new, wholly-owned subsidiary for the acquired exchanges. Nor do we oppose Valley's plans to treat the acquisition as a strategic business investment that is separate and apart from its current Arizona operations. We do not agree, however, that such plans are precluded by a requirement that the acquired exchanges be added to the existing study area for purposes of jurisdictional separations.

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[21] Oct. 1 Supplement at 1.

[22] AT&T comments at 2. *See* AT&T Petition for Rulemaking, filed Sept. 3, 1993, AAD 93-100.

[23] AT&T Comments at 4.

[24] The Independents reply comments at 5.

[25] *Id.* and US West reply comments at iii.

[26] US West reply comments at iii and 17.

[27] US West Letter.

[28] *See* Delta Telephone Company, 5 FCC Rcd 7100 (1990), whose USF support grew from $82,500 in 1991 to $396,910 in 1993; and US West and Gila River Telecommunications, Inc., 7 FCC Rcd 2161 (1992), whose USF support escalated from $169,155 in 1992 to $492,300 in 1993.

[29] The Commission adopted the Joint Board's recommendation for an indexed cap on the USF. The Joint Board recommended, and the Commission adopted, interim rules that will limit the rate of growth of the USF to the rate of growth in the total number of working loops nationwide. *Id.* That rate of growth has generally ranged from two percent to four percent per year. This moderate growth rate will allow the USF to continue to provide adequate support to carriers serving high-cost areas, while preventing excessive increases in the USF. *See generally* Amendment of Part 36 of the Commission's Rules and Establishment of a Joint Board, 9 FCC Rcd 334 (1993)("Recommend Decision"), *adopted* by the Commission, 9 FCC Rcd 303 ("Interim Order"). In its *Interim Order*, the Commission also expressed its intention to review the USF rules to determine whether permanent changes are necessary. *Interim Order* at 303.

[30] Copper Valley letter at 2.

15. We believe the proposed segmentation of Valley's planned telephone operations is at odds with the Commission's frozen study area policy. That policy was established, in part, to prevent the establishment of multiple study areas to gain an advantage under the USF and jurisdictional separations rules. In this case, the consolidation of the newly acquired exchanges with Valley's existing study area likely will result in a decline in USF assistance for the existing study area.[31] Hence, the creation of a new study area likely would enable Valley to avoid such a reduction and thereby gain an advantage under the USF rules. The establishment of a second Valley study area in Arizona would also result in unnecessary increased regulatory costs and increased administrative burden on this Commission. We thus deny Petitioners' request that Copper Valley be permitted to create a new study area.[32]

16. *Conclusion.* Petitioners have demonstrated that a waiver of the rule freezing study areas is warranted. We therefore grant the study area waiver petition, as conditioned below, to permit Midvale to consolidate its acquired exchange with its existing study area; to permit Table Top to create a new study area for its five acquired exchanges; and to permit US West to remove these six exchanges from its Arizona study area. We also grant the request that US West be permitted to remove four additional exchanges from its Arizona study area so they may be transferred to Copper Valley. This waiver is subject to the condition that the four exchanges being transferred to Copper Valley are consolidated with Valley's existing Arizona study area. This waiver also is subject to the condition that, absent explicit approval from us, future levels of annual USF support shall not exceed $219,292 for the new Table Top study area[33] and the current levels of support for the Midvale and Valley study areas. The limits imposed by this condition are consistent with Petitioners' representations--in the Joint Petition and October 19 Supplement--that the transfers will not result in increased levels of USF support for Midvale or Copper Valley. Indeed, Midvale estimates that its annual USF draw will decrease by $8,500 and our calculations indicate that Valley's annual USF draw also will decrease when it consolidates Copper Valley with its existing Arizona study area. This condition therefore will ensure the study area waiver will not result in adverse effects on the USF that exceed the initial forecast representation made by Petitioners.

III. PRICE CAPS WAIVER

Background

17. Section 61.41(c) of the Commission's rules provides that, when a non-price cap company acquires a price cap company, the acquiring company shall become subject to price cap regulation within a year of the transaction.[34] The Commission stated that this "all-or-nothing" rule applies not only to the acquisition of an entire LEC but also to the acquisition of part of a study area.[35] Hence, under this rule, the Independents' acquisition of US West's ten rural exchanges obligates them to exit the NECA pools and become subject to price cap regulation instead of rate-of-return regulation.

18. The Commission explained that the all-or-nothing rule is intended to address two concerns it has regarding mergers and acquisitions involving price cap LECs. The first concern is that, in the absence of the rule, a company might attempt to shift costs from its price cap affiliate to its non-price cap affiliate, allowing the non-price cap affiliate to earn more--due to its increased revenue requirement--without affecting the earnings of the price cap affiliate, *i.e.*, without triggering the sharing mechanism. The second concern is that, absent the rule, a LEC may attempt to "game the system" by switching back and forth between rate-of-return regulation and price cap regulation. The Commission cited, as an example, the incentive a LEC may have to raise rates by building up a large rate base under rate-of-return regulation and, then, after opting for price caps again, to increase earnings by cutting costs back to an efficient level. It would disserve the public interest, the Commission stated, to allow a LEC to alternately "fatten up" under rate-of-return regulation and "slim down" under price caps regulation, because rates would not fall in the manner intended under price cap regulation. The Commission nonetheless recognized that a narrow waiver of the

[31] The decline in USF assistance likely would occur because the average loop cost for Valley's existing study area likely will decrease when that high-cost study area is consolidated with the four lower-cost exchanges.

[32] We nonetheless approve Petitioners' request that Table Top be permitted to create a new study area. Table Top is mostly owned by an affiliate of Ponderosa Telephone Company ("Ponderosa"), which operates only in California. *See* Oct. 19 Supplement at TT-1. The attempted consolidation of Table Top's Arizona exchanges with Ponderosa's existing California study area would greatly complicate the jurisdictional separations process and our review of the results of that process, because costs and revenues for a merged multi-jurisdictional study area would have to be apportioned among the federal jurisdiction and multiple state jurisdictions with increased probabilities of errors. We therefore expect the creation of a new study area for Table Top to result in a reduction, not an increase, in regulatory costs and administrative burden, as compared with a requirement that Table Top's study area in Arizona be merged with Ponderosa's study area in California.

[33] Table Top estimates that its initial level of USF assistance would increase to $308,568 two years later and to $354,720 five years later, due to the costs associated with plant upgrades and satisfying demand growth. *See* Oct. 19 Supplement at Attachment TT-1. Given the long periods involved, such forecasts may not be reliable. As noted above, our experience with Delta Telephone Company and Gila River Telecommunications indicates that the actual levels of support may be three or four times higher than the levels forecasted. We therefore are limiting Table Top's level of support to the initial post-transfer amount it has estimated. If Table Top completes its planned upgrades and finds that its average loop cost is substantially higher than initially projected, it may petition for modification of this waiver and make a showing based on actual experience.

[34] 47 C.F.R. § 61.41(c). *See* Second Report and Order, 5 FCC Rcd 6786, 6821 (1990) and Erratum, 5 FCC Rcd 7664 (1990) (*LEC Price Cap Order*), *modified on recon.* 6 FCC Rcd 2637 (1991) (*LEC Price Cap Reconsideration Order*), *petitions for further recon. dismissed*, 6 FCC Rcd 7482 (1991), *aff'd, National Rural Telecom Assoc. v. FCC*, 988 F.2d 174 (D.C., Cir. 1993), *further modification on recon.*, 6 FCC Rcd 4524 (1991) (*ON A Part 69 Order*), *second further recon.*, 7 FCC Rcd 5235 (1992).

[35] The Commission explained that, if these two types of acquisitions were not treated the same under the all-or-nothing rule, a LEC could avoid the rule by selling all but one of its exchanges. *See LEC Price Cap Reconsideration Order*, 6 FCC Rcd 2637, 2706.

all-or-nothing rule might be justified if efficiencies created by the purchase and sale of a few exchanges were to outweigh the threat that the system may be subject to gaming.[36]

Petition and Comments

19. The Independents seek waiver of Section 61.41(c) so they may operate as rate-of-return companies, rather than price cap companies, after acquiring the ten exchanges which currently are under price cap regulation. They submit that the rule's application in this instance is contrary to the public interest and does not serve the purposes for which the rule was adopted. They argue that the Commission's two concerns, the threat of cost shifting between affiliates and gaming of the system, are not at issue in this case.[37] Both NECA and USTA support this waiver request.[38]

Discussion

20. We agree with the Independents that the Commission's first concern underlying the all-or-nothing rule is not applicable in this case. The Independents have no incentive to shift costs between price cap and rate-of-return affiliates, because they are not seeking to maintain separate affiliates under different systems of regulation. As to the Commission's second concern, we find it implausible that US West could game the system by moving the ten exchanges back and forth between price caps and rate-of-return regulation, because US West is selling these exchanges and a reacquisition would require a second study area waiver. Even so, the proposed sale could be a source of concern. After divesting itself of high-cost exchanges, US West might decide that rates in its remaining study area should not be adjusted to reflect the resulting decrease in the network costs on which its current price caps are based.[39] US West has stated, however, that it will reduce its interstate revenue requirements to reflect the transfer of the ten exchanges to the Independents and then will adjust its price cap indices accordingly.[40]

21. We therefore find there is good cause to grant the Independents a waiver of the all-or-nothing rule. For the present, we will continue to regulate the Independents as cost carriers. Because we are waiving Section 61.41(c), they need not withdraw from the NECA pools. We note that, as with any other rate-of-return carrier, the Independents may elect price cap regulation in the future if they decide to withdraw from the NECA pools.

IV. ORDERING CLAUSES

22. Accordingly, IT IS ORDERED, pursuant to Section 4(i) and 5(c) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and 155(c) and Sections 0.91 and 0.291 of the Commission's Rules, 47 C.F.R. §§ 0.91, 0.291, that the Joint Petition of US West Communications, Inc., Copper Valley Telephone, Inc., Midvale Telephone Exchange, and Table Top Telephone Company for waiver of Part 36, Appendix-Glossary, of the Commission's Rules, 47 C.F.R. Part 36 Appendix-Glossary, IS GRANTED subject to the conditions set forth above.

23. IT IS FURTHER ORDERED that the Petition of Copper Valley Telephone, Inc., Midvale Telephone Exchange, and Table Top Telephone Company for waiver of Section 61.41(c) of the Commission's Rules, 47 C.F.R. § 61.41(c), IS GRANTED.

24. IT IS FURTHER ORDERED that NECA shall not distribute USF assistance exceeding the limits imposed in paragraphs 12 and 16, *supra*.

FEDERAL COMMUNICATIONS COMMISSION

Kenneth P. Moran
Chief, Accounting and Audits Division
Common Carrier Bureau

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[36] *LEC Price Cap Reconsideration Order*, 6 FCC Rcd 2637, 2706.

[37] Joint Petition at 6.

[38] NECA comments at 4 and USTA comments at 2.

[39] The Commission is considering the generic issue that is posed more generally by this set of circumstances in CC Docket No. 94-1. After reviewing the record in that docket, the Commission may require an automatic adjustment to price capped rates to reflect the costs that are being removed from price cap regulation.

[40] US West Letter.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

Gregory J. Vogt
Deputy Chief, Cable Services Bureau

In the Matter of

Cable Programming Service Complaint filed against Tele-Media of Martha's Vineyard — CUID No. MA0273

Concerning Cable Programming Service Rates

ORDER

Adopted: February 17, 1995; Released: February 21, 1995

By the Deputy Chief, Cable Services Bureau:

1. In this Order we dismiss a complaint against the price Tele-Media of Martha's Vineyard was charging for its cable programming service ("CPS") tier in Martha Vineyard, Massachusetts, CUID No. MA0273, on the grounds that the complaint was untimely filed.[1] The Commission regulates rates for CPS only upon the filing of a valid complaint. As explained below, our review revealed that this complaint was untimely filed. Therefore, the Commission lacks statutory jurisdiction to consider this complaint, and accordingly it is dismissed.

2. The Cable Television Consumer Protection and Competition Act of 1992 provides that a complaint concerning existing rates may be filed within a 180-day period following the effective date of the regulations prescribed by the Commission.[2] The filing of a valid complaint within the 180-day time limit establishes our jurisdiction to review CPS rates that were in effect on the effective date of our regulations. The Commission's cable rate regulation rules became effective September 1, 1993, thereby establishing February 28, 1994, as the deadline for filing complaints concerning then-existing CPS rates. The complaint in this proceeding was not filed until March 1, 1994, which makes it untimely. Therefore, we lack statutory jurisdiction to consider this complaint.[3]

3. Accordingly, IT IS ORDERED, pursuant to Section 623(c)(3) of the Communications Act of 1934, as amended, 47 U.S.C. § 543(c)(3), that the complaint filed against the cable programming service price charged by Tele-Media of Martha's Vineyard, CUID No. MA0273, is HEREBY DISMISSED.

4. This action is taken pursuant to delegated authority under Section 0.321 of the Commission's rules, 47 C.F.R. § 0.321.

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[1] One complaint was filed against Tele-Media of Martha's Vineyard on March 1, 1994. Tele-Media of Martha's Vineyard filed a motion to dismiss and a cost of service rate justification. In addition to filing a cost of service rate justification in this proceeding, Tele-Media also filed cost of service rate justifications for its franchise areas of Oak Bluffs, Massachusetts, CUID No. MA0272; Chilmark, Massachusetts, CUID No. MA0274; Gay Head, Massachusetts, CUID No. MA0275; West Tisbury, Massachusetts, CUID No. MA0276; and Tisbury, Massachusetts, CUID No. MA0277. However, we show no complaints filed with this Commission in these franchise areas. Because there are no complaints filed against the prices charged in these franchise areas, Tele-Media of Martha's Vineyard was not required to file rate justifications.

[2] *See* Communications Act, § 623(c)(3), 47 U.S.C. § 543(c)(3).

[3] *Id.*

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

NewChannels Corporation Coraopolis, Pennsylvania	CUID Nos. PA0057, PA0058, PA0059, PA0060, PA1873 and PA1971

Benchmark Filing To Support
Cable Programming Service Price

MEMORANDUM OPINION AND ORDER

Adopted: February 16, 1995; Released: Februaruy 21, 1995

By the Deputy Chief, Cable Services Bureau:

I. INTRODUCTION

1. Here we consider complaints about the price NewChannels Corporation ("NewChannels") was charging for its cable programming service ("CPS") tier in CUID Nos. PA0057, PA0058, PA0059, PA0060, PA1873 and PA1971. NewChannels has chosen to attempt to justify its price through a benchmark showing on FCC Form 393. This Order addresses the reasonableness of NewChannels's price only through May 14, 1994. At a later date we will issue a separate order addressing the reasonableness of the price after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

II. PROCEDURAL MATTERS

4. The first CPS complaint was completed and served on NewChannels on October 30, 1993.[11] The Commission received the complaint on November 2, 1993.

5. NewChannels attempted to justify its CPS price through FCC Form 393's filed on December 6, 1993 for CUID No. PA0059; February 14, 1994 for CUID Nos. PA0058, PA0060, PA1873 and PA1971; and February 16, 1994 for CUID No. PA0057. NewChannels amended its justification on July 5, 1994, in response to a Cable Services Bureau Order citing common deficiencies observed in benchmark filings generally.[12]

III. DISCUSSION

6. NewChannels asserts that its monthly CPS tier price of $10.77 per subscriber is justified by its benchmark filing because its price is equal to the maximum permitted charge of $10.77 as calculated in the filing. Upon review of NewChannels's Form 393, we have found no apparent errors that would require a recalculation of NewChannels's maximum permitted CPS price.

IV. CONCLUSIONS

7. Upon review of the record herein, we conclude that NewChannels has demonstrated that $10.77 per month (plus franchise fee) was the maximum reasonable CPS tier price for the period November 2, 1993 to May 14, 1994.[13]

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[1] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent NewChannels has sought to take advantage of the refund deferral period under the *Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking*, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (*"Second Order on Reconsideration"*), the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which NewChannels implemented its CPS price under the new regulations. *See* para. 3, *infra*.

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] *Order* in MM Docket No. 92-266, *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] *See Second Order on Reconsideration;* 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration* at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration* at 4189 n.195.

[11] The complaint was dated October 26, 1993 and states that it was mailed to NewChannels on October 30, 1993. NewChannels has not complied with 47 C.F.R. § 76.956(a), which requires it to state when service occurred. Under these circumstances we will consider October 30, 1993 as the service date.

[12] *Cable Operators' Rate Justification Filings*, DA 94-526, 9 FCC Rcd 7752 (Cab. Serv. Bur. 1994).

[13] This finding is based solely on the representations of NewChannels listed in paragraph 5, *supra*. Should information come to our attention that these representations (including

8. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the October 30, 1993 complaint against the cable programming service price charged by NewChannels Corporation in Coraopolis, Pennsylvania, CUID Nos. PA0057, PA0058, PA0059, PA0060, PA1873 and PA1971, and all other complaints relating to the same price, ARE DENIED TO THE EXTENT INDICATED HEREIN.

9. IT IS FURTHER ORDERED that the benchmark filing submitted by NewChannels Corporation in Coraopolis, Pennsylvania, with respect to CUID Nos. PA0057, PA0058, PA0059, PA0060, PA1873 and PA1971 for the period of November 2, 1993 to May 14, 1994, justifies a maximum price of $10.77 per month (plus franchise fee) for NewChannels Corporation's cable programming service tier.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Deputy Chief, Cable Services Bureau

representations as to data regarding installations and customer equipment) were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Cablevision Industries — CUID No. FL0106
Cape Coral, Florida

Benchmark Filing To Support
Cable Programming Service Price

MEMORANDUM OPINION AND ORDER

Adopted: February 16, 1995; Released: February 21, 1995

By the Deputy Chief, Cable Services Bureau:

I. INTRODUCTION

1. Here we consider complaints about the price Cablevision Industries ("CVI") was charging for its cable programming service ("CPS") tier in Cape Coral, Florida, CUID No. FL0106. CVI has attempted to justify its price through a benchmark showing on FCC Form 393. This Order addresses the reasonableness of CVI's price only through May 14, 1994. At a later time we will issue a separate order addressing the reasonableness of the price after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

II. PROCEDURAL MATTERS

4. The first complete and timely CPS complaint was completed and served on CVI on November 5, 1993. The Commission received the complaint on November 9, 1993.

5. CVI attempted to justify its CPS price through an FCC Form 393 filed on June 27, 1994.

III. DISCUSSION

6. CVI asserts that its monthly CPS tier price of $11.50 per subscriber is justified by its benchmark filing because its price is less than the maximum permitted charge of $12.08 as calculated in its filing. Upon review of CVI's June 27, 1994 Form 393, we have found no apparent errors that would result in CVI's CPS tier price exceeding its maximum permitted price.

IV. CONCLUSIONS

7. Upon review of the record herein, we conclude that Cablevision Industries' showing supports a CPS tier price of $11.50 per month (plus franchise fee) for the period November 9, 1993 to May 14, 1994.[11]

8. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the November 5, 1993 complaint against the cable programming service price charged by Cablevision Industries in Cape Coral, Florida, CUID No. FL0106, and all other complaints related to the same price, ARE DENIED TO THE EXTENT INDICATED HEREIN.

9. IT IS FURTHER ORDERED that the benchmark filing submitted by Cablevision Industries with respect to Cape Coral, Florida, CUID No. FL0106, for the period of

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[1] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent CVI has sought to take advantage of the refund deferral period under the *Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking*, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (1994) (*"Second Order on Reconsideration"*), the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which CVI implemented its CPS price under the new regulations. *See* para. 3, *infra*.

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] *Order* in MM Docket No. 92-266, *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] *See Second Order on Reconsideration;* 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[11] This finding is based solely on the representations of CVI in its Form 393 response listed in paragraph 5, *supra*. Should information come to our attention that these representations (including representations as to data regarding installations and customer equipment) were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

November 9, 1993 to May 14, 1994, justifies a maximum price of $11.50 per month (plus franchise fee) for Cablevision Industries' cable programming service tier.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Deputy Bureau Chief
Cable Services Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

NYNEX Telephone Companies Transmittal No. 365

Revisions to Tariff F.C.C. No. 1

ORDER

Adopted: February 16, 1995; Released: February 17, 1995

By the Acting Chief, Tariff Division, Common Carrier Bureau:

1. On January 24, 1995, the NYNEX Telephone Companies (NYNEX) filed Transmittal No. 365 to establish common rate levels for Broadcast Video Services (BVS) offered to its customers in New England and New York. Specifically, NYNEX proposes to unify the monthly recurring rate element for the BVS Video Bridging optional feature in the New England Telephone (NET) and the New York Telephone Company (NYT) areas by repricing, within the price cap regulations, the monthly per port bridging rate in effect in the NET area.[1] Transmittal No. 365 is scheduled to become effective on February 21, 1995.

2. BVS is currently offered under NYNEX Tariff F.C.C. No. 1 as a one-way broadcast quality video service. According to NYNEX, bridging is an optional feature of full-time BVS that enables three or more customer designated-premises to be connected at NYNEX hubs in a multipoint service configuration. With the BVS bridging option, a port charge applies for each service connection to the bridging devise. NYNEX explains that this tariff filing establishes a unified monthly BVS bridging rate of $99 per port for all NYNEX customers.[2]

3. NYNEX states that the revisions in Transmittal No. 365 also comply with the Commission's rules and policies governing price caps. Previously, on January 11, 1995, NYNEX submitted a letter[3] to the Common Carrier Bureau (Bureau) revising its price cap indices (PCIs) to conform with the Bureau's Order granting common carriers subject to price cap regulation a *sua sponte* waiver of the rules to permit exogenous cost treatment of regulatory fees imposed on them by Section 9 of the Communications Act of 1934, 47 U.S.C. § 159, and the Commission's implementing regulations.[4] NYNEX indicates that Transmittal No. 365 incorporates the revised PCIs as described in its January letter to the Bureau, and includes all supporting information as required by Section 61.49 of the Commission's rules, 47 C.F.R. § 61.49.[5]

4. MCI Telecommunications Corporation (MCI) filed a petition to suspend and investigate Transmittal No. 365 on January 31, 1995, and NYNEX replied on February 2, 1995. MCI objects to the NYNEX proposal to treat the assessment of regulatory fees as exogenous costs because it is based on the Bureau's *Regulatory Fee Waiver Order*, which it believes is procedurally flawed and unlawful. MCI Petition at 2. MCI argues that the Bureau's *Regulatory Fee Waiver Order* violates the Commission's existing rules requiring local exchange carriers to file for a waiver of the price cap rules for exogenous treatment of regulatory fees. *Id.*

5. NYNEX replies that MCI does not object to the video rate elements that it is introducing, but rather to the exogenous treatment of costs associated with regulatory fees. NYNEX Reply at 2. In this regard, NYNEX argues that MCI's petition should be denied because it merely reiterates the arguments that MCI makes in its pending petition for reconsideration of the Bureau's *Regulatory Fee Waiver Order*. *Id.* NYNEX asserts that the Bureau's *Regulatory Fee Waiver Order* has not been stayed and remains in effect pending reconsideration of that order. *Id.*

6. The Tariff Division has reviewed the tariff filed by NYNEX. We conclude that no compelling argument has been presented that an investigation of this tariff is warranted at this time.

7. Accordingly, IT IS ORDERED that the petition to suspend and investigate NYNEX Tariff F.C.C. Transmittal No. 365, filed by MCI Telecommunications Corporation IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Geraldine A. Matise
Acting Chief, Tariff Division
Common Carrier Bureau

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[1] NYNEX Transmittal No. 365, Description and Justification (D&J) at 1.

[2] D&J at 2.

[3] Letter to William F. Caton, Acting Secretary, F.C.C., from Jacob J. Goldberg, Vice President, Access and Network Interconnection Marketing, NYNEX Government Affairs Co., dated Jan. 11, 1995 (NYNEX Letter).

[4] Price Cap Treatment of Regulatory Fees Imposed by Section 9 of the Communications Act, 9 FCC Rcd 6060 (Com. Car. Bur. 1994) (*Regulatory Fee Waiver Order*).

[5] D&J at 2.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	
Community TV Corporation	NH0236 Laconia, NH
Harron Communications Corp.	TX0265 Red Oak, TX
Chambers Communications Corp.	WA0100 Snohomish County, WA
Southern Multimedia Communications, Inc.	GA0070 Fulton County, GA
Cable Video Enterprises, Inc.	MO0407 Glasgow, MO MT0076 Lexington, MO
Motions to Dismiss Form 329 Complaints	

MEMORANDUM OPINION AND ORDER

Adopted: February 16, 1995; Released: February 21, 1995

By the Deputy Chief, Cable Services Bureau:

1. The complaints against operators in the communities captioned above state that they are being filed to object to a rate increase for the CPS tier. In each case, the operator has filed a motion to dismiss the complaint on the basis that it was not timely filed, and thus is not a valid CPS complaint.

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[1] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[2] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[3] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.

3. The Commission's original rate regulations took effect on September 1, 1993.[4] The Commission subsequently revised its rate regulations effective May 15, 1994.[5] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[6] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[7] In each case captioned above, the operator did file either an FCC Form 393 benchmark rate justification submission, or a cost of service rate justification submission.

4. Under the Commission's rules, a complaint regarding a rate change for the CPS tier may be filed within 45 days from the date the complainant first receives a bill reflecting the rate change.[8] However, after reviewing the records in these cases, we have determined that these complaints do not relate to changes in regulated CPS rates, but to charges that have remained unchanged since September 1, 1993.[9] To challenge such rates, acomplaint must be filed no later than February 28, 1994.[10] Each of the complaints addressed in this order was filed after February 28, 1994.[11] The Commission's jurisdiction is triggered by the filing of a valid complaint.[12] Because these complaints were filed beyond the statutory deadline, we are without jurisdiction, and we accordingly dismiss these complaints.

5. Accordingly, IT IS ORDERED, pursuant to Section 76.953(c), 47 C.F.R. §76.953(c), that the complaints set forth in Appendix A ARE DISMISSED.

6. This action is taken pursuant to delegated authority under Section 0.321 of the Commission's rules, 47 C.F.R. §0.321.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Deputy Chief, Cable Services Bureau

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[1] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993) (Cable Act of 1992).
[2] 47 C.F.R. § 76.956.
[3] 47 C.F.R. § 76.956(b).
[4] Order in MM Docket No. 92-266, Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).
[5] *See* Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, MM Docket No. 92-266, Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, 9 FCC Rcd 4119 (1994) (*Benchmark Order):* 47 C.F.R. § 76.922(b).
[6] *See Benchmark Order*, 9 FCC Rcd at 4190, paras. 150-152.
[7] *Id.*
[8] 47 C.F.R. § 76.953(b). Complaints about rates in effect on September 1, 1993 must be filed by February 28, 1994. 47 C.F.R. § 76.953(a).
[9] To the extent that these complaints object to changes in the rate charged for the basic tier and associated equipment, we lack jurisdiction to consider those complaints. Except in limited circumstances, the Commission does not have jurisdiction over rates for the basic service tier, and cannot act upon complaints concerning rates for that tier. When only basic rates are being challenged, the complaint should properly be brought to the attention of the local franchising authority in the first instance, and not filed with this Commission.
[10] 47 C.F.R. § 76.953(a).
[11] The filing date of each complaint is shown at Attachment A.
[12] *See* 47 U.S.C. § 522.

Attachment A

CPS Complaints Dismissed by this Order

Operator	CUID, Community	Complainant Date Filed
Community TV Corporation	NH0236 Laconia, NH	Town of Alton 10/31/94
Harron Communications Corp.	TX0265 Red Oak, TX	City of Red Oak 01/13/95
Chambers Communications Corp.	WA0100 Snohomish County, Washington	Joseph H. Bailey 12/28/94
Southern Multimedia Communications, Inc.	GA0070 Fulton County, GA	Greg Avedissian 12/22/93
Cable Video Enterprises, Inc.	MO0407 Glasgow, MO	City of Glasgow 08/24/94
Cable Video Enterprises, Inc.	MT0076 Lexington, MO	Donna C. Swartz 07/08/94

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	
Multimedia Cablevision, Inc.	IL0538 Lisle, Ill.
King Videocable Co.	MN0394 South Washington County, MN MN0396, MN0399, MN0400 MN0401
Vantage Cable Assoc., L.P.	WY0088, Big Piney, WY
Multi-Cablevision	MI0704, Whitmore Lake, MI
Community TV Corp.	NH0009 Gilford, NH NH0073 Meredith, NH NH0158 New Durham, NH
Sonic Cable Television of Northern California	CA0090 Portola, CA
Service Electric Cable TV, Inc.	PA0479 Bethlehem, PA PA0478 Allentown, PA
Motions to Dismiss Complaints Concerning Cable Services Rates	

ORDER

Adopted: February 16, 1995; Released: February 21, 1995

By the Deputy Chief, Cable Services Bureau:

1. In this Order we grant several motions to dismiss complaints on the grounds that the complaints concern rates that are outside the jurisdiction and authority of this Commission. As explained below, the Commission regulates rates for cable programming services (CPS) only, and then only upon filing of a valid complaint. Our review reveals that the complaints listed at Attachment A below, while asserting that they challenge CPS rates, challenge only rates for basic services, not for CPS. These complaints therefore do not trigger the Commission's jurisdiction, and they are accordingly dismissed.

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[1] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The Cable Act distinguishes among basic cable service, premium cable service, and cable programming service;[2] this Commission regulates only cable programming service. CPS includes all video programming distributed over the system that is not on the basic service tier[3] and for which the operator does not charge on a per-channel or per-program basis.[4] The filing of a valid complaint against CPS rates triggers an obligation for the cable operator to file a justification of its CPS prices.[5] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[6] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.

3. The Commission's original rate regulations took effect on September 1, 1993.[7] The Commission subsequently revised its rate regulations effective May 15, 1994.[8] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[9] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[10] In each case captioned above, the operator did file either an FCC Form 393 benchmark rate justification submission, or a cost of service rate justification submission. In each case, the operator also filed a Motion to Dismiss the complaint on the grounds that it challenged rates for service(s) outside this Commission's jurisdiction. The operators argue that challenges against rates for basic service should be submitted to the appropriate local franchising authority rather than to the Commission.

4. Each of the complaints under consideration here was filed with this Commission on an FCC Form 329. FCC Form 329 is used by subscribers or local franchising authorities wishing to lodge with the Commission a complaint about an operator's CPS rates. The form is entitled "Cable Programming Services Rate Complaint." While it is designed for use in challenging upper tier rates, the form itself does not explain or define basic tier, premium, or

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[1] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993) (Cable Act of 1992).

[2] Cable Act of 1992, Section 602, 47 U.S.C. §522.

[3] The basic service tier includes (at a minimum) the broadcast signals distributed by the cable operator along with any public, educational, and government (PEG) access channels that the local franchise authority requires the cable operator to carry. At the cable operator's discretion, this basic service tier may also include additional program services.

[4] We need not discuss here those channels which are asserted by the operator to be a la carte, since that distinction is beyond the scope of this Order.

[5] 47 C.F.R. § 76.956.

[6] 47 C.F.R. § 76.956(b).

[7] Order in MM Docket No. 92-266, Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[8] *See* Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, MM Docket No. 92-266, Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, 9 FCC Rcd 4119 (1994) (*Benchmark Order*); 47 C.F.R. § 76.922(b).

[9] *See Benchmark Order*, 9 FCC Rcd at 4190, paras. 150-152.

[10] *Id.*

cable programming services tier, but simply uses the term cable programming services' or CPS.' It is thus possible that a complainant might complete such a complaint form, and might check the box which states that "this complaint challenges the operator's CPS rates," without actually having distinguished or understood the difference between basic tier rates, premium service rates, and CPS tier rates.[11]

5. We have examined the complaints listed in Attachment A, and the motions to dismiss filed against them, and we conclude that each complaint challenges only basic rates, not CPS rates. Although in most cases the complainant has checked the box indicating that the rates challenged are CPS rates, and that these rates violate the Commission's rules,[12] the specific information provided by the complainant indicates that only basic rates are actually at issue. When only basic rates are being challenged, the complaint should properly be brought to the attention of the local franchise authority in the first instance, and not filed with this Commission. If one of these complaints does in fact challenge CPS rates, the complainant should file a petition for reconsideration providing information adequate to support its challenge.

6. Accordingly, IT IS ORDERED, that the motions to dismiss considered herein ARE GRANTED to the extent discussed above.

7. IT IS FURTHER ORDERED, pursuant to Section 623(a)(2)(A) and (B), 47 U.S.C. §543(a)(2)(A) and (B), that the complaints listed in Appendix A hereto ARE DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Deputy Chief, Cable Services Bureau

Attachment A

Complaints Dismissed by this Order

Cable Operator	CUID No., Community	Complainant
Multimedia Cablevision, Inc.	IL0538 Lisle, Ill.	Bernadine Clark
King Videocable Co.	MN0394 MN0396 MN0399 MN0400 MN0401	So. Washington County Cable Commission
Vantage Cable Assoc., L.P.	WY0088, Big Piney, WY	Town of Big Piney, WY
Multi-Cablevision	MI0704, Whitmore Lake, MI	Harry Post
Community TV Corp.	NH0009 Gilford, NH NH0073 Meredith, NH NH0158 New Durham, NH	Town of Gilford Town of Meredith Town of New Durham
Sonic Cable Television of Northern California	CA0090 Portola, CA	City of Portola
Service Electric Cable TV, Inc.	PA0479 Bethlehem, PA PA0478 Allentown, PA	Stanley J. Wynman Lynn B. Snyder, Charlotte R. Snyder

[11] We note that operators have great latitude in determining what channels will be included in the basic tier; once the statutory minimum (broadcast and PEG channels, as discussed above) is met, the operator may include as many additional channels in the basic tier as it wants, or it may move additional channels to a higher tier. Thus it is possible that a complainant might not clearly understand which channels are part of which tier.

[12] The form was changed in December 1993. *See* News Release of December 13, 1993. The change produced a simpler, clearer form, but even the new form does not provide definitions of or distinctions among the various service tiers. The specific assertion that the complainant is challenging CPS rates that violate the Commission's rules is question 13 on the original form; we note that this question has been eliminated on the new form. All the complaints noted here were filed on the original, pre-modification complaint form, and all contain the certification that they challenge CPS rates.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: February 8, 1995

INTERACTIVE VIDEO AND DATA SERVICE (IVDS) APPLICATIONS TO BE GRANTED FEBRUARY 28, 1995

On Tuesday, February 28, 1995, the Federal Communications Commission will issue 337 IVDS licenses covering 187 markets. A listing of these licensees is attached. These licensees were winning bidders at an auction held by the FCC on July 28 and 29, 1994. Each timely filed the required down payment and FCC Form 574.

Licensees must pay an amount equal to the remaining balance due on their high bid price on or before Tuesday, March 7, 1995. Small businesses eligible for installment payments must make a payment of 10% of their high bid amount. License grants are conditioned on timely payment of the full amount due. Payment, accompanied by FCC Form 159, must be made to Mellon Bank in accordance with instructions that were previously distributed to winning bidders. Small businesses wishing to pay the balance of their high bid may do so. Information on the installment payment plans and how they will be administered will be furnished directly to all eligible applicants. A sample FCC Form 159 also is attached. Failure to complete the FCC Form 159 properly and use the same FCC account number used on previous payments may result in a delay in processing this next payment.

For further information, contact the Consumer Assistance Branch at 1-800-322-1117. For questions regarding how to submit payments, please contact Regina Dorsey, Chief, Billings and Collections Branch, at (202) 418-1995.

FEDERAL COMMUNICATIONS COMMISSION

INDEX OF IVDS MARKET NUMBERS AND LOCATIONS

Market	Location
34	Rochester, NY
40	Dayton, OH
41	Birmingham, AL
44	Albany-Schenectady-Troy, NY
47	Greensboro-Winston Salem-High Point, NC
48	Toledo, OH-MI
50	Honolulu, HI
53	Syracuse, NY
56	Northeast Pennsylvania, PA
57	Tulsa, OK
59	Richmond, VA
63	Springfield-Chicopee-Holyoke, MA
65	Omaha, NE-IA
66	Youngstown-Warren, OH
68	Flint, MI
74	Fresno, CA
75	Austin, TX
77	Tuscon, AZ
78	Lansing-East Lansing, MI
79	Knoxville, TN
80	Baton Rouge, LA
81	El Paso, TX
83	Mobile, AL
84	Harrisburg, PA
85	Johnson City-Kingsport-Bristol, TN-VA
86	Albuquerque, NM
88	Chattanooga, TN-GA
89	Wichita, KS
90	Charleston-North Charleston, SC
91	San Juan-Caguas, PR
92	Little Rock-North Little Rock, AR
94	Saginaw-Bay City-Midland, MI
95	Columbia, SC
96	Fort Wayne, IN
97	Bakersfield, CA
98	Davenport-Rock Island-Moline, IA-IL
99	York, PA
100	Shreveport, LA
101	Beaumont-Port Arthur, TX
102	Des Moines, IA
103	Peoria, IL
105	Lancaster, PA
106	Jackson, MS
108	Augusta, GA-SC
109	Spokane, WA
110	Huntington-Ashland, WV-KY-OH
112	Corpus Christi, TX
113	Madison, WI
115	Utica-Rome, NY
116	Lexington-Fayette, KY
117	Colorado Springs, CO
119	Evansville, IN-KY
120	Huntsville, AL
122	Binghamton, NY
124	Santa Barbara-Santa Maria-Lompoc, CA
125	Appleton-Oshkosh-Neenah, WI
126	Salina-Seaside-Monterey, CA
127	Pensacola, FL
128	McAllen-Edinburg-Mission, TX
129	South Bend-Mishawaka, IN
130	Erie, PA
131	Rockford, IL
135	Eugene-Springfield, OR
138	Macon-Warner Robins, GAh)139Montgomery, AL
140	Charleston, WV
141	Duluth, MN-WI
143	Johnstown, PA
147	Ponce, PR
150	Visalia-Tulare-Porterville, CA
152	Portland, ME
153	Columbus, GA-AL
155	Savannah, GA
156	Portsmouth-Dover-Rochester, NH-ME
157	Roanoke, VA
158	Lima, OH
160	Killeen-Temple, TX
161	Lubbock, TX
162	Brownsville-Harlingen, TX
163	Springfield, MO
164	Fort Myers, FL
165	Fort Smith, AR-OK
167	Sarasota, FL
168	Tallahassee, FL
169	Mayaguez, PR
171	Reno, NV
172	Lincoln, NE
173	Biloxi-Gulfport, MS
174	Lafayette, LA
175	Santa Cruz, CA
176	Springfield, IL
178	Wheeling, WV-OH
179	Topeka, KS
180	Springfield, OH
182	Fayetteville-Springdale, AR
185	Terre Haute, IN
186	Green Bay, WI
187	Anchorage, AK
188	Amarillo, TX
190	Boise City, ID
191	Yakima, WA
192	Gainesville, FL
193	Benton Harbor, MI
194	Waco, TX
195	Cedar Rapids, IA
196	Champaign-Urbana-Rantoul, IL
197	Lake Charles, LA
199	Steubenville-Weirton, OH-WV
200	Parkersburg-Marietta, OH-WV
201	Waterloo-Cedar Falls, IA
202	Arecibo, PR
203	Lynchburg, VA
204	Aguadilla, PR
205	Alexandria, LA
206	Longview-Marshall, TX
207	Jackson, MI
213	Pittsfield, MA
214	Richland-Kennewick-Pasco, WA
215	Chico, CA
216	Janesville-Beloit, WI
218	Wilmington, NC
219	Monroe, LA
220	Abilene, TX
221	Fargo-Moorehead, ND-MN
222	Tuscaloosa, AL
223	Elkhart-Goshen, IN
224	Bangor, ME
225	Altoona, PA

226	Florence, AL
229	Medford, OR
230	Decatur, IL
232	Eau Claire, WI
233	Wichita Falls, TX
235	Petersburg-Colonial Heights, VA
237	Tyler, TX
238	Sharon, PA
239	Joplin, MO
240	Texarakana, TX-AR
241	Pueblo, CO
246	Dothan, AL
247	Lafayette, IN
248	Burlington, VT
249	Anniston, AL
250	Bloomington-Normal, IL
251	Williamsport, PA
252	Pascagoula, MS
253	Sioux City, IA-NE
254	Redding, CA
255	Odessa, TX
256	Charlottesville, VA
257	Hagerstown, MD
258	Jacksonville, NC
259	State COllege, PA
260	Lawton, OK
261	Albany, GA
262	Danville, VA
263	Wausau, WI
264	Florence, SC
265	Fort Walton Beach, FL
266	Glens Falls, NY
267	Sioux Falls, SD
268	Billings, MT
272	Gadsden, AL
275	St. Joseph, MO
276	Grand Forks, ND-MN
278	Columbia, MO
279	Lewiston-Auburn, ME
280	Burlington, NC
281	Laredo, TX
283	Panama City, FL
284	Elmira, NY
285	Las Cruces, NM
286	Dubuque, IA
287	Bryan-College Station, TX
288	Rochester, MN
289	Rapid City, SD
290	La Crosse, WI
291	Pine Bluff, AR
293	Owensboro, KY
294	San Angelo, TX
295	Midland, TX
296	Iowa City, IA
297	Great Falls, MT
298	Bismarck, ND
299	Casper, WY
300	Victoria, TX
306	Gulf of Mexico

IVDS AUTHORIZATIONS GRANTED

File No.	Applicant	Market No.	Frequency Block
840044	Maria Magnus	34	A
840045	Loli, Inc.	34	B
840052	Carl Davis	40	A
840053	Mager Investment Corp.	40	B
840054	Elleron Telecommunications Corp.	41	A
840055	Eagle Interactive Partners, LP	41	B
840059	Prime Time Networks Corporation	44	A
840060	1st ITV Partners I	44	B
840061	MKS Interactive, Inc.	47	B
840062	Welch Communications, Inc.	48	A
840063	MKS Interactive, Inc.	48	B
840065	American Interactive West Inc.	50	B
840067	Loli, Inc.	53	A
840068	B & C Communication Service	53	B
840072	Pegasus IVDS, Inc.	56	B
840073	Elleron Telecommunications Corp.	57	B
840076	One Number Information Systems, Inc.	59	B
840078	Daniel Rivera Sr.	63	A
840079	Friends of IVDS	63	B
840082	Inter-American Communications, Inc.	65	A
840083	IGGW Interactive Inc.	65	B
840084	Windgate Fund, LLC	66	A
840085	Shaker IVDS Partners	66	B
840088	21st Century Interactive Partnership	68	A
840089	M&B XXXIX, Inc.	68	B
840096	Philip Chike Nchekwube, Esq.	74	A
840097	IVDS Auction Consortium Limited Partnership	74	B
840098	Acoma Corporation	75	A
840099	Joann Hartley	75	B
840102	Joann Hartley	77	A
840103	Gateway Communications, Inc.	77	B
840104	21st Century Interactive Partnership	78	A
840105	Dunbar Television Corporation	78	B
840106	Pro Capital Resources, Inc.	79	A
840107	Rose Regency, Ltd.	79	B
840108	Gulfnet Communications, Inc.	80	A
840109	Southeast Equities, Inc.	80	B
840110	Harinder Kumra	81	A
840111	Loli, Inc.	81	B
840114	Daniel Rivera Sr.	83	A
840483	United Interactive Partners	83	B
840115	Emerging Technology Partners	84	B
840116	Fulton Software	85	A
840117	Ernestine Kincer	85	B
840484	Pueblo Communications, Inc.	86	A
840118	Elleron Telecommunications Corp.	86	B
840120	Eagle Interactive Partners, LP	88	A
840121	Harford SMR Inc.	88	B
840122	IVIDCO, LLC	89	A

File No.	Applicant	Market No.	Frequency Block
840123	Stephen Elliot	89	B
840124	Intervisions Communications Technologies	90	A
840125	MKS Interactive, Inc.	90	B
840126	Tele-Link Communications, Inc.	91	A
840127	Hispania & Associates, Inc.	91	B
840128	IVDS Enterprises Joint Venture	92	A
840485	Ballpark Souvenirs Inc.	92	B
840129	21st Century Interactive Partnership	94	B
840130	Albert Ervin	95	A
840131	L.R. Byrd & Associates/Hot Topics Network	95	B
840132	IVDS Enterprises Joint Venture	96	A
840133	Shaker IVDS Partners	96	B
840134	Trans Pacific Interactive, Inc.	97	A
840135	WCI Partners	97	B
840136	IVIDCO, LLC	98	A
840137	Stephen Elliot	98	B
840138	Triad TV Data	99	A
840139	Dunbar Television Corporation	99	B
840140	Loli, Inc.	100	B
840486	CWW Partnership	101	A
840141	Southeast Equities, Inc.	101	B
840142	Interactive Development Enterprises Corp.	102	A
840143	Micom Partners	102	B
840144	Bay Shore IVDS Partners	103	B
840146	Interactive Control Two, Inc.	105	A
840147	Kingdon Hughes	105	B
840148	TV-Active Partnership	106	A
840149	Active Communications Partners	106	B
840152	Eagle Interactive Partners, LP	108	A
840487	Ballpark Souvenirs Inc.	108	B
840488	New Media Ventures, Inc.	109	A
840153	Radmila Tise	109	B
840154	20th Century Interactive, Inc.	110	A
840155	Friends of IVDS	110	B
840158	Dr. Joseph Zavaletta	112	A
840159	M&B XXXIX, Inc.	112	B
840160	Interactive Video Corp.	113	A
840161	Euphemia Banas	113	B
840162	Loli, Inc.	115	B
840163	Interactive Communications Group, Inc.	116	A
840164	Shaker IVDS Partners	116	B
840165	America 52 West, Inc.	117	A
840166	Mary's Radio Shop	117	B
840168	Women's Collateral Access Fund, Inc.	119	A
840169	Andrew Saban	119	B
840170	Eagle Interactive Partners, LP	120	A
840171	Combined Interactive, Inc.	120	B
840490	Ballpark Souvenirs Inc.	122	B
840174	Gonzalo Vidal	124	B
840492	Janice Communications, Inc.	125	A
840175	Interactive Innovations, Inc.	125	B
840176	Premier Interactive, Inc.	126	B

File No.	Applicant	Market No.	Frequency Block
840177	Joann Hartley	127	A
840178	AG Partners	127	B
840179	Acoma Corporation	128	A
840180	Dr. Joseph Zavaletta	128	B
840181	Richard Quiroga	129	A
840182	IVDS On-Line Partnership	130	A
840183	Shaker IVDS Partners	130	B
840184	Loli, Inc.	131	A
840185	M&B XXXIX, Inc.	131	B
840189	Vista Communications, Inc.	135	A
840190	Uniteview-ICI, LP	135	B
840194	Eagle Interactive Partners, LP	138	A
840195	Friends of IVDS	138	B
840196	Eagle Interactive Partners, LP	139	A
840197	Active Communications Partners	139	B
840198	Triad TV Data	140	A
840199	D. Kent Moss	140	B
840201	Remote Vision Interactive, Inc.	141	A
840200	Kingdon Hughes	141	B
840204	Two Way TV Inc.	143	A
840205	P.A.W., Inc.	143	B
840211	Elleron Telecommunications Corp.	147	A
840212	Hispania & Associates, Inc.	147	B
840217	Loli, Inc.	150	A
840218	Two Way TV Inc.	150	B
840221	Loli, Inc.	152	A
840222	Uniteview-ICI, LP	152	B
840223	Eagle Interactive Partners, LP	153	A
840224	Pegasus IVDS, Inc.	153	B
840226	Eagle Interactive Partners, LP	155	A
840227	Star Interactive Video	155	B
840228	Loli, Inc.	156	A
840229	KC Communications, Inc.	156	B
840230	22nd Century Communications, Inc.	157	A
840231	Premier Interactive, Inc.	157	B
840232	Progressive Communications	158	A
840233	TV-Active Partnership	158	B
840235	InfoAccess, Inc.	160	A
840236	Two Way TV Inc.	160	B
840494	Georgia Felger	161	A
840237	Superior Interactive Group, Inc.	161	B
840238	Acoma Corporation	162	A
840239	Dr. Joseph Zavaletta	162	B
840240	Donald Lee	163	A
840241	SBM Holdings, Incorporated	163	B
840242	Shaker IVDS Partners	164	A
840243	Active Communications Partners	165	B
840246	Shaker IVDS Partners	167	A
840247	Bernard Pasquet	168	A
840248	Pegasus IVDS, Inc.	169	A
840249	Interamerican Cellular Communications Corp.	169	B
840252	New Wave Communications, Inc.	171	B

File No.	Applicant	Market No.	Frequency Block
840253	Windgate Fund, LLC	172	A
840254	IGGW Interactive Inc.	172	B
840255	Eagle Interactive Partners, LP	173	A
840495	United Interactive Partners	173	B
840256	Southeast Equities, Inc.	174	B
840257	Deko Holdings Corporation	175	A
840258	Harinder Kumra	175	B
840259	21st Century Group General Partnership	176	A
840262	On-Screen USA Interactive, Inc.	178	A
840263	Women's Collateral Access Fund, Inc.	178	B
840264	Donald Lee	179	A
840265	IVDS Enterprises Joint Venture	179	B
840266	Carl Davis	180	A
840267	TV-Active Partnership	180	B
840269	Active Communications Partners	182	A
840496	Ballpark Souvenirs Inc.	182	B
840497	Ballpark Souvenirs Inc.	185	B
840273	21st Century Group General Partnership	186	A
840274	IVIDCO, LLC	186	B
840275	Richard Quiroga	187	A
840276	Loli, Inc.	187	B
840498	Georgia Felger	188	A
840277	The Hago Company, Inc.	188	B
840499	New Media Ventures, Inc.	190	A
840280	Uniteview-ICI, LP	190	B
840281	West Coast Partners #22	191	A
840282	Premier Interactive, Inc.	191	B
840283	John Elliott	192	A
840284	Friends of IVDS	193	A
840285	WJT Enterprises	193	B
840286	Richard Quiroga	194	A
840287	Two Way TV Inc.	194	B
840288	Infopower Inc.	195	A
840289	National Technologies, Unlimited	196	A
840290	Elleron Telecommunications Corp.	196	B
840291	Southeast Equities, Inc.	197	B
840294	Women's Collateral Access Fund, Inc.	199	A
840500	Ballpark Souvenirs Inc.	199	B
840295	Triad TV Data	200	A
840296	Royal Communications, Inc.	200	B
840297	Elleron Telecommunications Corp.	201	A
840298	Interamerican Cellular Communications Corp.	202	A
840299	Hispania & Associates, Inc.	202	B
840300	Frances Lyles	203	B
840301	Elleron Telecommunications Corp.	204	A
840302	Interamerican Cellular Communications Corp.	204	B
840303	Red Hot Radio	205	A
840304	Two Way TV Inc.	206	A
840305	ABR Communications	206	B
840306	Friends of IVDS	207	A
840307	WJT Enterprises	207	B
840313	Pegasus IVDS, Inc.	213	A

File No.	Applicant	Market No.	Frequency Block
840314	MAR Partnership	213	B
840315	Washington Communications Inc.	214	A
840316	America 52 West, Inc.	214	B
840317	Two Way TV Inc.	215	A
840318	New Wave Communications, Inc.	215	B
840319	Loli, Inc.	216	A
840320	Euphemia Banas	216	B
840323	IVDS On-Line Partnership	218	A
840324	WCTV Partners	218	B
840325	Gulfnet Communications, Inc.	219	A
840326	Michael Kang	220	A
840327	Complete IVDS, Inc.	220	B
840328	Interactive Communications Group, Inc.	221	A
840329	Two Way TV Inc.	221	B
840330	Rose Regency, Ltd.	222	A
840331	Joann Hartley	222	B
840332	Richard Quiroga	223	A
840333	Vitech Corporation	223	B
840334	Tel/Logic Inc.	224	A
840335	Andrew Saban	224	B
840336	Manuel Moreno	225	A
840337	P.A.W., Inc.	225	B
840338	Eagle Interactive Partners, LP	226	A
840339	Active Communications Partners	226	B
840342	Seven Gables Properties, Inc.	229	A
840343	Cyrus K. Dam Survivors Trust	229	B
840344	Vitech Corporation	230	A
840345	Media Ventures	230	B
840348	21st Century Group General Partnership	232	A
840349	The Hago Company, Inc.	232	B
840350	Vitech Corporation	233	A
840351	Nanowave Technologies	233	B
840353	Haynes Communications Corporation	235	B
840356	Two Way TV Inc.	237	A
840357	ABR Communications	237	B
840358	Two Way TV Inc.	238	A
840359	Shaker IVDS Partners	238	B
840360	Two Way TV Inc.	239	A
840361	SBM Holdings, Incorporated	239	B
840362	G. Ray Hale	240	A
840363	ABR Communications	240	B
840364	America 52 West, Inc.	241	A
840365	Joann Hartley	241	B
840371	Graceba Total Communications, Inc.	246	A
840372	Vitech Corporation	246	B
840373	Bellingham Corporation	247	A
840374	Andrew Saban	247	B
840375	New England Mobile Communications Inc.	248	A
840376	Vitech Corporation	249	A
840377	Cyberkom	249	B
840504	Ballpark Souvenirs Inc.	250	A
840378	Media Ventures	250	B

File No.	Applicant	Market No.	Frequency Block
840379	Rita McCauley	251	A
840380	Pegasus IVDS, Inc.	251	B
840381	Red Hot Radio	252	A
840505	United Interactive Partners	252	B
840382	Stephen Elliott	253	B
840383	Philip Chike Nchekwube, Esq.	254	A
840384	New Wave Communications, Inc.	254	B
840506	Georgia Felger	255	A
840385	Vision TV, Inc.	255	B
840386	Deko Holdings Corporation	256	A
840387	Deko Holdings Corporation	257	A
840388	Friends of IVDS	257	B
840389	WCTV Partners	258	A
840390	Wayne Partners	258	B
840391	Clarke Group	259	A
840392	Bay Shore IVDS Partners	259	B
840393	G. Ray Hale	260	A
840394	Women's Collateral Access Fund, Inc.	260	B
840395	Eagle Interactive Partners, LP	261	A
840396	Friends of IVDS	261	B
840397	Wayne Partners	262	A
840398	Frances Lyles	262	B
840399	21st Century Group General Partnership	263	A
840400	Vitech Corporation	263	B
840401	WCTV Partners	264	A
840402	L.R. Byrd & Associates/Hot Topics Network	264	B
840403	Active Communications Partners	265	A
840404	Andrew Saban	265	B
840405	Vitech Corporation	266	A
840507	Ballpark Souvenirs Inc.	266	B
840406	Women's Collateral Access Fund, Inc.	267	A
840407	Stephen Elliott	267	B
840408	Remote Vision Interactive, Inc.	268	A
840409	Two Way TV Inc.	268	B
840416	Eagle Interactive Partners, LP	272	A
840417	Star Interactive Video	272	B
840422	Vitech Corporation	275	B
840423	Interactive Communications Group, Inc.	276	A
840424	G. Ray Hale	276	B
840427	Two Way TV Inc.	278	A
840428	Stephen Elliott	278	B
840429	Wayne Partners	279	A
840430	John Elliott	279	B
840431	Windgate Fund, LLC	280	B
840432	Acoma Corporation	281	A
840433	Dr. Joseph Zavaletta	281	B
840436	Graceba Total Communications, Inc.	283	A
840437	Styles Interactive Inc.	283	B
840438	Loli, Inc.	284	A
840439	Vitech Corporation	284	B
840440	Cyrus K. Dam Survivors Trust	285	A
840441	21st Century Interactive Partnership	285	B

File No.	Applicant	Market No.	Frequency Block
840442	Elleron Telecommunications Corp.	286	A
840443	Bay Shore IVDS Partners	286	B
840444	The Hago Company, Inc.	287	A
840445	Richard Quiroga	287	B
840446	Joann Hartley	288	A
840447	Mary's Radio Shop	288	B
840448	Sioux Valley Rural Television Inc.	289	B
840449	21st Century Group General Partnership	290	A
840450	Media Ventures	290	B
840451	ABR Communications	291	A
840452	Vitech Corporation	291	B
840454	Elleron Telecommunications Corp.	293	A
840455	Robert Steele	293	B
840456	Loli, Inc.	294	A
840457	Vitech Corporation	294	B
840458	Complete IVDS, Inc.	295	A
840508	Georgia Felger	295	B
840459	Interactive Development Enterprises Corp.	296	A
840460	G. Ray Hale	297	A
840461	New Wave Communications, Inc.	297	B
840462	Women's Collateral Access Fund, Inc.	298	A
840463	Vitech Corporation	298	B
840464	G. Ray Hale	299	A
840465	Friends of IVDS	299	B
840466	Dr. Joseph Zavaletta	300	A
840467	Infopower Inc.	300	B
840477	Loli, Inc.	306	A
840478	Argosy, Inc.	306	B

Before the
Federal Communications Commission
Washington, D.C. 20554

Gen. Docket No. 88-476

In the Matter of

New York Metropolitan Area
Public Safety Plan

ORDER

Adopted: March 22, 1995; Released: March 30, 1995

By the Acting Chief, Private Wireless Division, Wireless Telecommunications Bureau and the Acting Chief, Spectrum Engineering Division, Office of Engineering and Technology:

1. On November 28, 1994, the Private Radio Bureau and the Office of Engineering and Technology, acting under delegated authority, approved an amendment to the New York Metropolitan Area (Region 8) Public Safety Plan (Plan). *Order*, Gen. Docket No. 88-476, adopted November 28, 1994, DA 94-1329. In the *Order*, we inadvertently failed to note that Mr. Charles L. Larsen filed a timely comment on August 2, 1994.

2. We have reviewed Mr. Larsen's comment. Mr. Larsen opposed the amendment to the Region 8 Plan noting the scarcity of frequencies in the New York metropolitan area. We note that his objection is not directed against the proposed amendment, but rather the public safety National Planning process. We find that our approval of the amendment was consistent with Commission authority pursuant to *Report and Order*, in Gen. Docket No. 87-112.

3. Accordingly, we reaffirm our decision of November 28, 1994, that the Public Safety Radio Plan for the New York Metropolitan Area (Region 8) IS AMENDED, as set forth in the Region's letter of July 11, 1994.

4. For further information, contact Mark Rubin at (202) 418-0680.

FEDERAL COMMUNICATIONS COMMISSION

Robert H. McNamara
Acting Chief, Private Wireless Division

Lawrence P. Petak
Acting Chief, Spectrum Engineering Division

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

CHARTER NETWORK COMPANY,
Complainant,

v.

THE OHIO BELL TELEPHONE COMPANY,	File No. E-92-44
ILLINOIS BELL TELEPHONE COMPANY,	File No. E-92-45
MICHIGAN BELL TELEPHONE COMPANY,	File No. E-92-47
INDIANA BELL TELEPHONE COMPANY,	File No. E-92-48
INCORPORATED, and WISCONSIN BELL, INC.,	File No. E-92-49

Defendants.

FEDERAL COMMUNICATIONS COMMISSION

Thomas D. Wyatt
Chief, Formal Complaints and
Investigations Branch
Enforcement Division
Common Carrier Bureau

ORDER

Adopted: March 23, 1995; Released: March 30, 1995

By the Chief, Formal Complaints and Investigations Branch, Enforcement Division, Common Carrier Bureau:

1. On February 21, 1992, Charter Network Company filed the above-captioned complaints against the defendants seeking to recover damages from the defendants for alleged violations of the Commission's rules in connection with the defendants' computation and assessment of terminating carrier common line ("CCL") charges. On March 13, 1995, the parties filed a joint motion to dismiss the complaints stating that the parties have negotiated a mutually agreeable settlement of all pending controversies.

2. We are satisfied that granting the parties' joint motion to dismiss the complaints with prejudice will serve the public interest by eliminating the need for further litigation and the expenditure of further time and resources of the parties and of the Commission.

3. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and the authority delegated in Section 0.291 of the Commission's rules, 47 C.F.R. § 0.291, that the parties' Joint Motion to Dismiss IS GRANTED.

4. IT IS FURTHER ORDERED that the above-captioned complaints ARE DISMISSED WITH PREJUDICE and the proceedings ARE TERMINATED.

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
March 24, 1995

Released: March 30, 1995

Mr. John Morisse, President
Commutron Limited
1600 Brimley Road
Scarborough, Ontario
Canada M1P 3H1

RE: DA 93-1124

Dear Mr. Morisse:

On September 22, 1993, we requested comment on a petition for waiver filed by your company, Commutron, Ltd., asking the Commission to waive Section 68.312(b)(1)(i) of the Commission's rules. We received nine comments and seven reply comments from interested parties. Based on our review of the record, we are dismissing the waiver request without prejudice.

In the petition, you request waiver of Section 68.312(b)(1)(i) requiring customer premises equipment (CPE) to maintain 5 megohms of dc resistance over the on-hook voltage range from 0 to 100 volts to prevent an indication of a line fault at the local exchange carrier's central office and a consequent erroneous maintenance action by the telephone company. You request waiver of this Section in order to register as terminal equipment under Part 68 a device that maintains a dc resistance greater than 5 megohms over a range from 100 to 9.5 volts, but at 9.5 volts or less (off-hook condition) draws approximately 2.5 milliamperes off the telephone line to illuminate a light emitting diode (LED) indicating a line in use status on a parallel telephone or any other terminating device connected to the same line. You contend that the light indicating a line in use would help to forestall interruptions of phone conversations or important data transmissions.

A majority of commenters, including Nexus Applied Research, Inc., New York Telephone Company and New England Telephone Company (NYNEX), Southwestern Bell Telephone Company, Telesector Resources Group of the NYNEX Corporation, Telecommunications Industry Association, United and Central Telephone Companies and USWest, oppose your waiver request because they assert that your device would adversely affect the Automatic Loop Insulation Testing (ALIT) that local exchange carriers use to verify the integrity of outside plant. They contend that if equipment attached to the network were automatically switched to low resistance in order to activate an indicator light, ALIT and other testing equipment would register misleading results, generating false trouble reports at the central offices of the local exchange carriers. These commenters further argue that if several Commutron-type devices were attached to extensions of the same line, the drain of current would multiply and increase the number of false trouble reports.

Only two commenters, BellSouth and Rummel Engineering, support your waiver request, although their support is qualified. BellSouth tentatively concludes that your device will not adversely affect its ALIT and supports waiver subject to later challenge should field experience indicate that the device harms its network. Rummel Engineering argues that allowing such waivers will enhance competition and facilitate the provision of new services. However, Rummel recommends that any line-in-use indicator draw no more than 1 milliampere from the telephone line, as opposed to the 2.5 milliamperes drawn by Commutron's device.

Based on our review of the record and the protection of network standards that our Part 68 requirements are meant to ensure, we find that you have failed to respond to the critical assertion of several commenters that your device will cause telephone companies' ALIT systems to malfunction by identifying a false ring-trip condition, thereby triggering unnecessary maintenance actions. You have not refuted such assertion, providing neither design information nor test data to show that the operation of your device will not adversely impact the network. The record strongly indicates operation of your device will lead to precisely the kind of harm that Section 68.312(b)(1)(i) is designed to prevent. Thus, you have failed to demonstrate that a grant of waiver is in the public interest. We therefore dismiss without prejudice your request for waiver of Section 68.312(b)(1)(i) of the Commission's Rules.

Sincerely,

James R. Keegan
Chief, Domestic Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In re:

Kentucky Central Television, Inc. CSR-3988-A
Hazard, Kentucky

For Modification of Station
WYMT-TV's ADI

MEMORANDUM OPINION AND ORDER

Adopted: March 23, 1995; Released: March 30, 1995

By the Cable Services Bureau:

I. INTRODUCTION

1. In the captioned proceeding, Kentucky Central Television, Inc. ("Kentucky Central"), licensee of television station WYMT, Hazard, Kentucky (CBS, channel 57), has requested the Commission to include all of the communities in Pike County, Bell County, and Floyd County, Kentucky (the "Communities") within the Lexington, Kentucky "area of dominant influence" ("ADI") for purposes of the cable television broadcast mandatory signal carriage rules.[1] No opposition to Kentucky Central's petition was filed.

II. BACKGROUND

2. Pursuant to Section 4 of the Cable Television Consumer Protection and Competition Act of 1992 ["1992 Cable Act"][2] and implementing rules adopted by the Commission in its *Report and Order*, Docket 92-259,[3] commercial television broadcast stations are entitled to assert mandatory carriage rights on cable systems located within the station's market. A station's market for this purpose is its "area of dominant influence" or ADI as defined by the Arbitron audience research organization.[4] An ADI is a geographic market designation that defines each television market exclusive of others, based on measured viewing patterns. Essentially, each county in the United States is allocated to a market based on which home-market stations receive a preponderance of total viewing hours in the county. For purposes of this calculation, both over-the-air and cable television viewing are included.[5]

3. Under the Act, however, the Commission is also directed to consider changes in ADI areas. Section 614(h) provides that the Commission may:

> with respect to a particular television broadcast station, include additional communities within its television market or exclude communities from such station's television market to better effectuate the purposes of this section.

In considering such requests, the Act provides that:

> the Commission shall afford particular attention to the value of localism by taking into account such factors as -
>
> (I) whether the station, or other stations located in the same area, have been historically carried on the cable system or systems within such community;

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[1] The Pike County Communities include: Pikeville, McVeigh, Elkhorn, Allegany, Shelbiana, Greasy Creek, Coal Run Hill, Mossy Bottom, Blackberry, Canada, Meta, Ransom, Sidney, Dorton, Jenkins, Myra, Shelby Gap, Argo, Boldman, Buskirk, Caney Creek, Chevy Valley, Chloe Creek, Collins, Delorme, Belcher, Etty Freeburn, Frozen Creek, Grassy, Hurricane, Jamboree, Jonancy, Little Robinson, Long Fork, Majestic, Carr, Nelson, Peter Fork, Phelps, Racoon, Racoon Creek, Robinson Creek, Speight, McAndrews, Wells Addition, Virgie, Ashcamp, Stopover, Draffin, Lick Creek, Mouthcard, Hellier, Millard, Regina, Belfry, Forest Hills, Goody, Hardy, Toler, Burnwell, Aflex, Hudd, South Williamson, Stone, Turkey Creek, Pike County Unincorporated, and Pinsonfork. The Bell County Communities include: Middlesboro, Pineville, Arjay, Kettle Island, Miracle, Calvin, Colman, Hance's Creek, Bell County Unincorporated, Hilltop, Hutch, Meldrum, Bird Branch, Clear Creek, Clearview, Ferndale, Fourmile, Hulen, Laurel Hill, Page, Page Cutoff, Tinsley, Varilla, William Branch, and Blackmont. The Floyd County Communities include: Prestonburg, New Allen, Frazier, Martin, Mud Creek, Teaberry, Brandy Keg, Cow Creek, Goble Roberts, Middle Creek, Mountain Parkway, Spurlock Creek, West Prestonburg, Bucks Branch, Coldwater, Daniels Creek, Eastern, Floyd County Unincorporated, Harold, Hueysville, Hurricane, Little Caney, Wayland, Prater Creek, Pyramid, Stanville, Warco, Estill, Allen, Beaver, Hi Hat, McDowell, Price, Abbot Creek, Cliff, Daniels Creek, Katyfriend, Town Branch, Banner, Big Mud, Branhams Creek, Bypro, Craynor, David, Fox Bottom, Garth, Hippo, Hunter, Ivel, Little Mud, Maytown, Prater Fork, Risner, Stephens Branch, Wheelwright, Pumpkin Center, Auxier, Drift, Ligon, Minnie, Simpson Branch, Bonanza, Corn Fork, Emma, Lancer, Arkansas Creek, Betsy Layne, Blue River, Brush Creek, Calf Creek, Dana, Dwale, Galveston, Grethel, Hite, Hunter's Branch, Langley, Manton, Peterfork, Printer, Salisbury, Tram and Wells Addition.

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992).

[3] *Report and Order*, MM Docket No. 92-259, 8 FCC Rcd 2965, 2976-2977 (1993) (*"Must Carry Order"*).

[4] Section 614(h)(1)(C) of the 1992 Cable Act specifies that a broadcasting station's market shall be determined in the manner provided in Section 73.3555(d)(3)(i) of the Commission's Rules, as in effect on May 1, 1991. This section of the rules, now redesignated Section 73.3555(e)(3)(i), refers to Arbitron's ADI for purposes of the broadcast multiple ownership rules. Section 76.55(e) of the Commission"s Rules provides that the ADIs to be used for purposes of the initial implementation of the mandatory carriage rules are those published in Arbitron's 1991-1992 *Television Market Guide*.

[5] Because of the topography involved, certain counties are divided into more than one sampling unit. Also, in certain circumstances, a station may have its home county assigned to an ADI even though it receives less than a preponderance of the audience in that county. For a more complete description of how counties are allocated, see Arbitron's *Description of Methodology*.

> (II) whether the television station provides coverage or other local service to such community;
>
> (III) whether any other television station that is eligible to be carried by a cable system in such community in fulfillment of the requirements of this section provides news coverage of issues of concern to such community or provides carriage or coverage of sporting and other events of interest to the community; and
>
> (IV) evidence of viewing patterns in cable and noncable households within the areas served by the cable system or systems in such community.[6]

4. The legislative history of this provision indicates that:

> where the presumption in favor of ADI carriage would result in cable subscribers losing access to local stations because they are outside the ADI in which a local cable system operates, the FCC may make an adjustment to include or exclude particular communities from a television station's market consistent with Congress' objective to ensure that television stations be carried in the areas which they serve and which form their economic market.
>
> * * * * *
>
> [This subsection] establishes certain criteria which the Commission shall consider in acting on requests to modify the geographic area in which stations have signal carriage rights. These factors are not intended to be exclusive, but may be used to demonstrate that a community is part of a particular station's market.[7]

5. The Commission provided guidance in its *Report and Order in Docket 92-259, supra,* to aid decision making in these matters, as follows:

> For example, the historical carriage of the station could be illustrated by the submission of documents listing the cable system's channel line-up (*e.g.,* rate cards) for a period of years. To show that the station provides coverage or other local service to the cable community (factor 2), parties may demonstrate that the station places at least a Grade B coverage contour over the cable community or is located close to the community in terms of mileage. Coverage of news or other programming of interest to the community could be demonstrated by program logs or other descriptions of local program offerings. The final factor concerns viewing patterns in the cable community in cable *and* noncable homes. Audience data clearly provide appropriate evidence about this factor. In this regard, we note that surveys such as those used to demonstrate significantly viewed status could be useful. However, since this factor requires us to evaluate viewing on a community basis for cable and noncable homes, and significantly viewed surveys typically measure viewing only in noncable households, such surveys may need to be supplemented with additional data concerning viewing in cable homes.

Id. at 2977 (emphasis in original).

6. In adopting rules to implement this provision, the Commission indicated that changes requested should be considered on a community-by-community basis rather than on a county-by-county basis and that they should be treated as specific to particular stations rather than applicable in common to all stations in the market.[8] The rules further provide, in accordance with the requirements of the Act, that a station not be deleted from carriage during the pendency of an ADI change request.[9]

7. Adding communities to a station's ADI generally entitles that station to insist on cable carriage in those communities. However, this right is subject to several conditions: 1) a cable system operator is generally required to devote no more than one-third of its activated channel capacity to compliance with the mandatory signal carriage obligations, 2) the station is responsible for delivering a good quality signal to the principal headend of the system, 3) indemnification may be required for any increase in copyright liability resulting from carriage, and 4) the system operator is not required to carry the signal of any station whose signal substantially duplicates the signal of any other local signal carried or the signals of more than one local station affiliated with a particular broadcast network. If, pursuant to these requirements, a system operator elects to carry the signal of only a single affiliate of a broadcast network, it is obliged to carry the affiliate from within the ADI whose city of license is closest to the principal headend of the cable system.[10] Accordingly, based on the specific circumstances involved, the addition of communities to a station's ADI may guarantee it cable carriage and specific channel position rights; simply provide the system operator with an expanded list of must-carry signals from which to choose, *i.e.,* when it has used up its channel capacity mandated for broadcast signals carriage, or determined which of duplicating network affiliated stations are entitled to carriage priority.

MARKET FACTS AND ARGUMENTS OF WYMT

8. The communities in question are in Pike County, Bell County, and Floyd County, Kentucky. Pike and Floyd Counties are located within the Charleston-Huntington, West Virginia ADI, and Bell County is located within the Knoxville, Tennessee ADI. WYMT is located in Hazard, Kentucky in the Lexington, Kentucky ADI. Hazard is in the southeastern-most portion of the Lexington ADI. The Communities in question border the southeast portion of the Lexington, Kentucky ADI.

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[6] Communications Act of 1934, as amended, § 614 (h)(1)(C)(ii), 47 U.S.C. § 534(h)(1)(C)(ii).

[7] H.R. Rep. No. 628, 102d Cong., 2d Sess. at 97 (1992).

[8] Must Carry Order, 8 FCC Rcd at 2977, n.139.

[9] 47 C.F.R. § 76.59.

[10] *Must Carry Order,* 8 FCC Rcd at 2981.

9. In support of its petition, Kentucky Central states that from the end of 1986 to the present, WYMT has been carried on the cable systems in Pike, Bell and Floyd Counties. In addition, Kentucky Central contends that it provides local service to the Communities by providing at least a Grade B signal to all of the communities in Floyd County, and to most of the communities in Bell and Pike Counties.[11] Furthermore, Kentucky Central contends that WYMT has provided local programming in this area for 7 years, whereas prior to WYMT commencing operations, the area was all but ignored. Kentucky Central notes that it maintains news bureaus in Middlesboro in Bell County, and in Harold, which is on the border of Floyd and Pike Counties. Kentucky Central lists a number of programs providing local news and information which it has aired, including sports telecasts, local economic development stories, health and safety issues, political presentations, reports on local education and other shows of local interest. In addition, Kentucky Central argues that no other commercial station provides news and programming of local interest to the level that WYMT does. Finally, Kentucky Central claims that it enjoys high viewership and net weekly circulation shares in both cable and noncable homes across the Communities. In support, Kentucky Central presents the following Arbitron Coverage Ratings for 1990-93:

	Bell County[12]	Pike County[13]	Floyd County[14]
1990-91			
Total Share	12	12	13
Net Weekly Cir.	60	64	78
1991-92			
Total Share	12	13	12
Net Weekly Cir.	57	74	70
1992-93			
Total Share	14	13	11
Net Weekly Cir.	62	69	69

ANALYSIS AND DECISION

10. Petitioner has made a persuasive case that the communities in question are logically part of WYMT's market for purposes of the cable television mandatory broadcast signal carriage rules under the standards set forth in Section 614(h) of the Communications Act and its petition will accordingly be granted. Hazard, WYMT's community of license, is generally closer to the communities in issue than are the principal communities of license in the Charleston-Huntington, West Virginia and Knoxville, Tennessee ADIs and Kentucky Central has presented evidence that its request complies with all four of the statutory elements. The station has been continuously carried in all of the Pike County, Bell County and Floyd County Communities since the end of 1986. The fact that cable operators in the Communities have continuously carried WYMT almost since it first went on the air demonstrates that the operators and their subscribers value the station and the service it provides. Kentucky Central has also shown that WYMT generally places at least a Grade B contour over the Communities. While we recognize that the station does not cover certain communities in the extreme ends of Bell County and Pike County with a predicted Grade B contour, we believe that because other factors such as historical carriage and high viewership weigh heavily in favor of granting Kentucky Central's market modification request, this should not prevent the Communities from being included in WYMT's ADI. With respect to programming and other local service to the cable Communities, Kentucky Central has shown that it provides programs of interest to the Communities, including coverage of state and local political activities along with sports and other community-specific stories. A detailed log of local interest programming provided by Kentucky Central supports this conclusion as do testimonials from the Congressional Representative of the 5th District of Kentucky and the Lieutenant Governor of the Commonwealth of Kentucky. Furthermore, Kentucky Central has maintained, and the attached testimonials have confirmed that no other commercial station qualified for carriage in the Communities provides the level of local interest programming as does WYMT. Finally, the Arbitron viewership data submitted demonstrates that WYMT is watched by the residents of Pike, Bell and Floyd Counties. The station has a strong viewing share and net weekly circulation in all three counties.

ORDER

11. In view of the foregoing, we find that grant of Kentucky Central's petition with the respect to the Communities in Pike County, Bell County and Floyd County, Kentucky is in the public interest.[15]

12. Accordingly, IT IS ORDERED, pursuant to §614 of the Communications Act of 1934, as amended (47 U.S.C. §534), and §76.59 of the Commission's Rules (47 C.F.R. §76.59), that the petition for special relief filed July 7, 1993 by Kentucky Central Television, Inc. IS GRANTED.

13. This action is taken pursuant to authority delegated by §0.321 of the Commission's rules.

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson
Deputy Chief, Cable Services Bureau

[11] Although WYMT does not specify which communities are not covered by at least a Grade B signal, it does provides a signal contour map with its filing. *See* Petition, Exhibit 8.
[12] *See* Petition, Exhibit 6.
[13] *See* Petition, Exhibit 5.
[14] *See* Petition, Exhibit 7.
[15] The Pike and Floyd County communities also remain within the Charleston-Huntington, West Virginia ADI, and the Bell County communities also remain within the Knoxville, Tennessee ADI.

Before the
Federal Communications Commission
Washington, D.C. 20554

ET Docket No. 91-280

In the Matter of

Amendment of Section 2.106 of	RM-7334 PP-1
the Commission's Rules to	RM-7399 PP-2
Allocate Spectrum to the Fixed-Satellite Service and the Mobile-Satellite Service for Low-Earth Orbit Satellites	RM-7612 PP-3

MEMORANDUM OPINION AND ORDER

Adopted: March 14, 1995; Released: March 30, 1995

By the Commission:

1. By this action, we deny a Petition for Reconsideration filed by STARSYS, Inc. (STARSYS). In its petition, STARSYS requests either that the Commission increase the permissible duty cycle[1] from 0.25% to 1.0% per 15 minute interval for low-Earth orbit (LEO) mobile-satellite service (MSS) code division multiple access (CDMA) spread spectrum systems in the 148-149.9 MHz band that do not avoid frequencies used by other services in this band, or that the Commission exempt from the duty cycle limitation CDMA systems operating below a certain power density. We are taking this action because we continue to believe that the power density and duty cycle requirements we adopted are necessary to prevent interference to incumbent government fixed and mobile operations that will share this band with LEO MSS on a co-primary basis.

BACKGROUND

2. In the *Report and Order* in this proceeding the Commission allocated the 148-149.9 MHz band for LEO MSS based on its analysis that the band could be shared with the incumbent government fixed and mobile operations.[2] The analysis concluded that such sharing would require certain limits on LEO MSS operations, including a power limit and a duty cycle.[3] The Commission found that a duty cycle is the ideal method for assuring that multiple earth stations do not have a cumulative effect that results in unacceptable interference to government fixed and mobile users. The power density limit was developed to maintain an ambient noise environment that is tolerable. We proposed limitations on LEO MSS after discussions with the National Telecommunications and Information Administration (NTIA) and representatives of other government agencies that utilize this band indicated that these users would need protection from interference. In the *Report and Order*, we adopted these specific limitations on power density and duty cycle, concluding that they reflected "the needs of the LEO proponents and yet provide[d] protection to existing fixed and mobile terrestrial users."[4]

DISCUSSION

3. In its Petition for Reconsideration, STARSYS argues that the Commission has created redundant and excessive interference protection criteria by adopting both maximum power density and duty cycle requirements. STARSYS contends that either requirement alone is sufficient to provide protection to existing fixed and mobile government users. Therefore, it requests that the Commission exempt LEO MSS systems using CDMA spread spectrum that operate with E.I.R.P. power densities below -16 dBW/4kHz from compliance with the 0.25% per 15 minute transmission duty cycle limitation.[5] Alternatively, STARSYS requests that the Commission modify the 0.25% per 15 minute transmission time limit for CDMA systems to 1.0% per 15 minute period.

4. STARSYS states that the duty cycle limit of 0.25% per 15 minute interval was intended to accommodate a data transmission rate of 4800 bits per second (bps) that was specified in its 1990 license application to construct and operate a system using CDMA spread spectrum.[6] However, it now claims that unanticipated interference in the 148-149.9 MHz band may force it to use a lower data transmission rate of 1200 bps, which with a duty cycle of 0.25% per 15 minute interval will result in an intolerably low data throughput. It argues that with a longer duty cycle of 1.0% per 15 minute period, its system would achieve throughput approximately equivalent to the throughput achieved with a data rate of 4800 bps when used with a duty cycle of 0.25% per 15 minute period. Accordingly, STARSYS requests that the duty cycle be increased to 1.0% to accommodate its lowering of the transmission rate to 1200 bps.

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[1] The duty cycle is a measure of the amount of time a transmitter is on versus its off time.

[2] *See Report and Order*, ET Docket No. 91-280, 8 FCC Rcd 1812 (1993). Prior to this proceeding, this band was allocated and used exclusively for government fixed and mobile operations.

[3] For LEO MSS systems that do not avoid frequencies actively being used by the government fixed and mobile service the Commission adopted a power density limit of -16 dBW/4kHz effective isotropic radiated power (E.I.R.P.); a duty cycle of 0.25% during any 15 minute period; a requirement that any single transmission not exceed 450 milliseconds in duration; and a requirement that consecutive transmissions on the same frequency be separated by at least 15 seconds.

[4] *Report and Order*, 8 FCC Rcd at 1815, para. 18.

[5] LEO MSS systems that use CDMA spread spectrum technology will not be able to avoid frequencies in this band that are actively being used by the government fixed and mobile service and therefore are subject to the power and duty cycle limits.

[6] We note that in its Petition for Rule Making STARSYS indicated that it would prefer to implement a CDMA spread spectrum system, but that alternatively it could utilize frequency division multiple access (FDMA). An FDMA system could be designed to avoid actively used government fixed and mobile channels. *See* STARSYS Petition, RM-7399 at 3-4 (May 4, 1990).

5. Orbital Communications Corporation (ORBCOMM) states in its comments that the problem described by STARSYS is unique to LEO MSS systems that use CDMA spread spectrum technology. It notes that the duty cycle requirement does not apply to LEO MSS systems that use FDMA and a system to avoid actively used government fixed and mobile channels. However, ORBCOMM agrees with STARSYS that the conditions placed on LEO satellite operations are more restrictive than necessary to adequately protect government users.[7] ORBCOMM further states that the restrictions placed on the band will involve extra cost for the satellite provider because the duty cycle limitations do not allow the operator to take advantage of periods when terrestrial services are at off-peak use. Nevertheless, ORBCOMM states that it is willing to bear the added costs of operating its system in full conformity with the rules adopted to protect government users.

6. In its reply comments, STARSYS states that no party, including the government agencies utilizing the band, objected toits request for relaxation of the duty cycle requirement. Further, it states the essence of ORBCOMM's comments is that a relaxation of the duty cycle limitation would be appropriate. Therefore, STARSYS argues that the Commission should grant its request to amend the duty cycle limitation for CDMA systems.

7. NTIA, as representative of the government users of the 148-149.9 MHz band, opposes STARSYS' request for relaxation of the duty cycle requirement. NTIA submitted a letter to the Commission through the Interdepartment Radio Advisory Committee.[8] The letter, which has been placed in this docket, concludes that in cases in which multiple earth stations exist within range of specific government mobile systems, the duty cycle limitation adopted by the Commission is necessary to protect these government systems.

8. We recognize that the power and duty cycle requirements will impose limitations on satellite operations in the 148-149.9 MHz band. However, we must ensure that adequate protection is afforded to the incumbent government users of the band. The regulations adopted in the *Report and Order* to provide this protection were developed through lengthy negotiations between the Commission and NTIA and in consultation with potential LEO MSS users.[9] Therefore, to the extent STARSYS is requesting a change of our rules that now require application of both the power density and duty cycle limitations, we do not find an adequate basis in the petition or the comments to make such a change. Moreover, to the extent STARSYS is requesting a waiver of these rules, we find that STARSYS has failed to sustain its heavy burden for a waiver.[10] STARSYS has not shown how exempting it from the duty cycle requirement will better serve the public interest.[11] NTIA has indicated that granting such a waiver would create the potential for unreasonable interference to government users who also have primary status in this band.

9. We also deny STARSYS' request to modify the duty cycle limitation for CDMA systems. As we have stated above, NTIA's letter indicates that the duty cycle limitation we adopted is necessary to protect government users in this band. The development and provision of LEO MSS must not result in unacceptable interference to those users. Therefore, we will not modify the duty cycle limitation for CDMA systems.[12] However, if after STARSYS implements its satellite system it believes that footnote US323 provides excessive protection to the government operations or finds that it is unable to engage in an economically viable service, we would entertain a petition seeking relief and approach NTIA to seek relaxation of the duty cycle limitation.

10. Accordingly, STARSYS' Petition for Partial Reconsideration is DENIED. This action is taken pursuant to Sections 4(i), 7(a), 303(c), 303(g), and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154(i), 157(a), 303(c), 303(g) and 303(r).

11. IT IS FURTHER ORDERED, that this proceeding is TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

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[7] *See* ORBCOMM at 3 (May 25, 1993).

[8] *See* letter from William D. Gamble, Chairman, IRAC to William Torak FCC IRAC Liaison, dated November 12, 1993.

[9] *Report and Order, supra* note 2.

[10] *See WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969) ("An applicant for waiver faces a high hurdle even at the starting gate.").

[11] *Id. See also Northeast Cellular Telephone Co. v. FCC*, 897 F2d 1164, 1166 (D.C. Cir. 1990).

[12] We note that the record demonstrates that LEO MSS intended for this band can be provided within the adopted duty cycle limit.

Before the
Federal Communications Commission
Washington, D.C. 20554

ET Docket No. 92-28

In the Matter of

Amendment of Section 2.106 of the Commission's Rules to Allocate the 1610-1626.5 MHz and the 2483.5-2500 MHz Bands For Use by the Mobile-Satellite Service, Including Non-Geostationary Satellites	PP-29, PP-30, PP-31, PP-32, PP-33

SECOND REPORT AND ORDER

Adopted: February 24, 1995; Released: March 30, 1995

By the Commission:

INTRODUCTION

1. By this action, we deny five pioneer's preference requests submitted by Constellation Communications, Inc. (Constellation), Ellipsat Corporation (Ellipsat), Loral Qualcomm Satellite Services, Inc. (LQSS), Motorola Satellite Communications, Inc. (Motorola), and TRW Inc. (TRW). These parties requested a pioneer's preference for their proposals with regard to non-geostationary (low-Earth orbit, or LEO) mobile satellite service (MSS) systems.

BACKGROUND

2. The pioneer's preference rules were established to reward a party responsible for significant innovations that relate to communications technology and service.[1] These rules ensure that innovators have an opportunity to participate either in new services that they take a lead in developing or in existing services to which they wish to apply new technologies. In the *Pioneer's Preference Report and Order*, we stated that pioneer's preference will foster the development of valuable new technologies and services and improve existing services by reducing for innovators the delays and risks associated with the Commission's allocation and licensing processes. We further stated that a significant reward should be given to encourage innovators to present their proposals to the Commission in a timely manner.[2] In the pioneer's preference review proceeding, we decided to continue to apply our existing pioneer's preference rules to proceedings in which Tentative Decisions have been issued.[3]

3. Under the rules adopted in the *Pioneer's Preference Report and Order*, each applicant for a preference must persuade us that its proposal is innovative, has merit, and that the applicant is the original developer of the innovation at issue. To be granted a pioneer's preference, an applicant must demonstrate that it has developed the new service or technology; *e.g.*, that it has developed the capabilities or possibilities of the service or technology or has brought the service or technology to a more advanced or effective state. The applicant also must demonstrate the technical feasibility of the new service or technology, either by submitting a technical feasibility showing or having submitted at least preliminary results of an experiment. Finally, a preference will be granted only if the rules adopted are a reasonable outgrowth of the proposal and lend themselves to grant of a preference.[4] Pioneer's preferences are granted only for major innovations, and are not granted casually.[5]

4. In the *Tentative Decision* in this proceeding, we decided not to award a pioneer's preference to any of the five applicants proposing to establish LEO MSS systems.[6] We were unable to discern a significant innovation in any of the five proposals that would warrant a preference grant. In each case, the technology relied upon to show innovation appeared to have been used on existing satellite systems. Specifically, Constellation's proposal to use micro-satellites and a dynamic receiver; Ellipsat's proposal to use elliptical orbits, seamless interconnections and spread spectrum technology; LQSS's proposal to use spot beams, smooth call hand-off, and a pilot channel for synchronization with gateway stations; Motorola's proposal to use a cellular design and spot beams; and TRW's proposal to use high elevation angles were found to be based upon existing technologies. Further, we found that none of the five applicants demonstrated the technical feasibility of their respective systems.

5. In the *Report and Order* in this proceeding, we allocated the 1610-1626.5 MHz (1.6 GHz) and 2483.5-2500 MHz (2.4 GHz) bands for MSS use on a co-primary basis with the existing Radiodetermination Satellite Service (RDSS).[7] We also deferred a final decision on the pioneer's preference requests until completion of the first phase of our pioneer's preference review proceeding.[8]

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[1] *See Report and Order (Pioneer's Preference Report and Order)*, GEN Docket No. 90-217, 6 FCC Rcd 3488, 3494 [at para. 48] (1991).

[2] *Id.* at 1, 18.

[3] *See First Report and Order*, ET Docket No. 93-266, 9 FCC Rcd 605 (1994). Subsequently, we required that recipients of pioneer's preferences in proceedings in which Tentative Decisions have been made pay for their licenses. *See Memorandum Opinion and Order on Remand*, ET Docket No. 93-266 and GEN Docket No. 90-314, 9 FCC Rcd 4055 (1994). In as much as we do not award any preferences in this proceeding, this recent change is not applicable here.

[4] *See* 47 C.F.R. § 1.402.

[5] *See Pioneer's Preference Report and Order* at para. 48.

[6] *See Notice of Proposed Rule Making and Tentative Decision*, ET Docket No. 92-28, 7 FCC Rcd 6414, 6419-22 (1992) ("Tentative Decision").

[7] *See Report and Order*, ET Docket No. 92-28, 9 FCC Rcd 536 (1994).

[8] *See Notice of Proposed Rule Making*, ET Docket No. 93-266, 8 FCC Rcd 7692 (1993).

DISCUSSION

6. Comments to the *Tentative Decision* were received from several parties. However, only Motorola contests the tentative denial of its request. A discussion of each request follows.

7. *Constellation (PP-29).* Constellation requests a pioneer's preference for its proposed LEO MSS system that would provide new services including voice and data messaging to previously unserved areas and users. Specifically, Constellation's proposal is for a nationwide satellite service that would serve areas and people that do not have access to any telecommunications service. It maintains that its approach is innovative because it proposes: 1) microsatellites that are designed as an outgrowth of other satellites that Constellation has pioneered for the U.S. military; 2) dynamic receivers; and 3) a new launch vehicle that enables satellites to be launched into orbit in a cost-efficient and reliable manner.

8. In the *Tentative Decision*, we concluded that Constellation's proposal merely combined existing technologies and did not constitute innovative achievements. We also noted that Constellation had neither demonstrated that its microsatellite and dynamic receiver are unique, nor provided a technical showing to demonstrate that its design surpassed the state-of-art in satellite communications technology. Thus, we tentatively concluded that Constellation did not warrant a preference. No commenting party addressed the tentative denial of Constellation's request. Accordingly, we find no further basis in the record before us to indicate that an award of a pioneer's preference is warranted and therefore, we deny Constellation's pioneer's preference request.

9. *Ellipsat (PP-30).* Ellipsat asserts that it was the first application for a LEO system in the RDSS bands. Specifically Ellipsat proposes to operate a nationwide mobile voice and position determination service via small low-Earth orbit satellites. It claims that as such, Ellipsat was the pioneer of using the RDSS bands for this new and expanded communications service. Thus, Ellipsat requests a pioneer's preference for its proposal for a voice and position determination LEO MSS system that would feature elliptical orbits. Ellipsat claims that its proposed system would be the first commercial use of elliptical orbits that optimize coverage over the United States. Further, it asserts that its code division multiple access (CDMA) spread spectrum technology will provide efficient spectrum use and facilitate sharing and multiple entry by other licensees. Ellipsat states its system will utilize "transparent interconnections" between ground and satellite stations resulting in a seamless communications network.[9] Ellipsat further claims that it will provide low-cost, high-quality voice service. Finally, it claims that it was the first to apply for a LEO MSS system in the 1.6 and 2.4 GHz bands.

10. In the *Tentative Decision,* we concluded that Ellipsat failed to meet its burden of demonstrating that its proposal is new and innovative. We found that the techniques Ellipsat proposes to use already exist in the satellite community and thus do not demonstrate an innovative contribution. We stated that elliptical orbits, relied upon by Ellipsat to demonstrate innovation, have been used by U.S. military satellites and the Russian Molnyia satellite. Further, we concluded that Ellipsat had not demonstrated that it pioneered the use of "transparent interconnections" between ground and satellite components. Finally, we concluded that Ellipsat did not have a significant lead over the other preference applicants in activities such as concept design and verifiable relevant experiments. Thus, we stated that it would be inappropriate to single out Ellipsat for a preference based on the timing of its submissions.

11. In comments to the *Tentative Decision*, Ellipsat supports our decision not to award any pioneer's preferences in this proceeding. Ellipsat did not submit additional information related to its own proposed system, stating only that if any preferences are awarded, it warrants a grant since it was the first to propose a LEO satellite system above 1 GHz. No other party commented on the tentative denial of Ellipsat's request. Accordingly, we find no further basis in the record before us to indicate that an award of a pioneer's preference is warranted and therefore, we deny Ellipsat's pioneer's preference request.

12. *LQSS (PP-31).* LQSS requests a pioneer's preference for its proposed enhanced RDSS system that it states can provide data and voice transmission to hand-held portable transceivers and also provide position determination services. LQSS argues that its proposed system reflects substantial development of new system architecture and provides for multiple users and interoperability with the existing public telephone switched network. Further, it claims that its satellite system design using eight satellites per circular orbital plane, spot beams, smooth call handoff, and a pilot channel for synchronization with gateway stations is innovative. Further, LQSS claims that its high system capacity accommodates thousands of voice and data users simultaneously. LQSS proposes to use CDMA spread spectrum technology that it developed and patented under its Qualcomm subsidiary. LQSS submits that all of these developments constitute innovations that satisfy the criteria for a pioneer's preference.

13. In the *Tentative Decision*, we found that LQSS's proposal offers no contribution to communications technology that is significantly innovative nor did its proposal offer anything new and innovative. We also tentatively held that its system design and spread spectrum technique are not innovations. Further, no party commented on the tentative denial of LQSS's request. Accordingly, we find no basis in the record before us to indicate that an award of a pioneer's preference is warranted and therefore, we deny LQSS's pioneer's preference request.

14. *Motorola (PP-32).* Motorola requests a pioneer's preference for its proposed LEO MSS system that it contends uses an innovative cellular design and spot beam technology. Motorola states that in the case of cellular telephones, a static set of cells serves a large number of mobile units, whereas in its proposed system, cells would, in effect, move rapidly over the Earth while mobile units remain relatively stationary. Motorola claims that the unique elements of its system are its spectral efficiency and innovative design that include the use of inter-satellite links, a combination of frequency division multiple access and time division multiple access techniques, and bi-directional capabilities.

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[9] Ellipsat states that transparent interconnections will allow communications beginning and ending with its hand-held units, but with access to other satellite systems, cellular radio systems, and the public switched telephone network.

15. In the *Tentative Decision*, we concluded that Motorola's approach does not offer any significant improvements or innovations in service or technology. We found that Motorola's use of inter-satellite links and its concept of moving cells and spot beams have been utilized in earlier satellite systems and are thus not innovative.

16. In comments to the *Tentative Decision*, Motorola contends that its proposed system warrants a preference because it constitutes a significant innovation over existing communications technology. It argues that it was the first to propose the LEO concept above 1 GHz and is the only proponent proposing to provide universal service.[10] Motorola further states that it has invested $100 million in research and development of its system and that this research will lead to establishment of a service not currently provided. Finally, it argues that we erred when we permitted a group of experts from other federal agencies to advise us on the merits of the requests without opening the results of this review to public comment. Motorola contends that this constituted peer review as contemplated by us when we established the pioneer's preference rules in Docket 90-217[11] and that we should have released the results of the experts' evaluations to the public for comment.

17. In reply comments, AMSC Subsidiary Corporation (AMSC), Constellation, and LQSS maintain that Motorola presents no information that was not available to us at the time of the *Tentative Decision*. AMSC maintains that Motorola did not demonstrate an innovation that justifies a preference and that we should not change our initial decision merely because we used an outside panel of experts to analyze the applications. Constellation asserts that we should not award Motorola a preference because Motorola has provided no technical basis to support its request. LQSS contends that granting Motorola's request would result in a monopoly because the bi-directional use Motorola proposes would preclude the operation of other systems in the same band. Ellipsat and TRW express support of our *Tentative Decision* to not grant any pioneer's preferences in this proceeding.

18. We agree with opposing parties that Motorola has presented no additional information to warrant award of a pioneer's preference. We conclude that Motorola has not demonstrated that its system is a significant innovation over existing technology. In particular, Motorola's use of inter-satellite links and its concept of moving cells and spot beams have been used in earlier satellite system designs. As we stated in the *Tentative Decision*, the U.S. military established inter-satellite link (crosslink) feasibility in 1976.[12] Further, moving cells and spot beams have been utilized by the Department of Defense on its satellites to improve coverage and provide frequency reuse.[13] We also disagree that Motorola was the first to conceive and design a LEO satellite system above 1 GHz. From the record, it appears that all of the pioneer's preference applicants were performing research and developing their proposals in approximately the same time frame.

19. Further, we find that even if Motorola's request appeared innovative, it still would not meet our pioneer's preference criteria because Motorola did not submit a technical feasibility showing of its proposed system prior to the *Notice of Proposed Rule Making and Tentative Decision* in this proceeding.[14] Rather, the information submitted by Motorola at that time was at the level of major spacecraft and ground segment systems and did not include the subsystem details necessary to establish technical feasibility.

20. Finally, with regard to the review performed by representatives of other government agencies, we disagree that this constituted peer review. These representatives were loaned on a "work-detail" basis, and they performed duties as Commission staff. The Commission obtained these employees using normal FCC personnel practices. Further, we follow this course of action routinely when we need additional resources or expertise in various matters. The purpose of their review was to provide independent analysis of the pioneer's preference requests, but not to perform peer review as discussed in the *Report and Order* in Docket 90-217. Therein, we contemplated soliciting assistance from either government or non-government experts who would not be functioning as Commission staff. We find nothing unfair in the Commission's use of employees on detail from other Government agencies to assist in the review of the various proposals.[15]

21. Accordingly, for the above stated reasons, we deny Motorola's pioneer's preference request.

22. *TRW (PP-33)*. TRW requests a pioneer's preference for developing a LEO MSS system that would use higher orbits to provide position determination, voice communications, and data services to mobile users. It claims that its proposed service is a significant and innovative new use because the provision of co-primary mobile voice and data services is not currently authorized in the 1.6 and 2.4 GHz bands. TRW states that its system combines the advantages of LEO and geostationary orbit (GSO) systems by providing low communications time delay compared to the delay associated with GSO systems, while using higher elevation angles than other LEO proponents to minimize obstruction by trees, buildings, and terrain. Finally, TRW states that its proposed system will provide inexpensive service to under

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[10] Motorola claims that its satellite system will permit subscribers to communicate using hand-held portable units from anywhere on the globe.

[11] *See Pioneer's Preference Report and Order*, at para. 50.

[12] *Tentative Decision*, at note 39.

[13] *Tentative Decision*, at note 40.

[14] Section 1.402 of our Rules states: "The applicant must accompany its preference request with either a demonstration of the technical feasibility of the new service or technology or an experimental license application, unless an experimental license application has previously been filed for that new service or technology." While Motorola did file an experimental license application in October 1991, that application was not granted until approximately the time of the *Notice of Proposed Rule Making and Tentative Decision* in August 1992. Therefore, it was incumbent upon Motorola to submit an acceptable showing of technical feasibility prior to that decision. Section 5.207 of our Rules states: "In order to be eligible for a tentative preference award at the time of a notice of proposed rule making in a proceeding addressing a new service or technology, the experimental applicant must have commenced its experiment and reported to the Commission at least preliminary results, unless it has also submitted an acceptable showing of technical feasibility."

[15] We note that it is not Commission policy to place FCC staff analysis and studies, that are used in the decision making process, into the public record.

served segments of society, including emergency service providers, farmers, ranchers, truckers, and automobile, sea, and air travelers.

23. In the *Tentative Decision*, we concluded that although TRW's LEO system would take advantage of higher orbits, its proposal was not sufficiently innovative to warrant a preference. We found that TRW merely had balanced the relative advantages and disadvantages of LEO versus GSO systems.

24. In comments to the *Tentative Decision*, TRW states that we pursued the most prudent and reasonable course in declining to award any of the applicants a preference. No other party commented on the proposed denial of TRW's request. Accordingly, we find no basis in the record before us to indicate that an award of a pioneer's preference is warranted and therefore, we deny TRW's pioneer's preference request.

ORDERING CLAUSE

25. Accordingly, IT IS ORDERED, That the pioneer's preference requests filed by Constellation Communications, Inc., Ellipsat Corporation, Loral Qualcomm Satellite Services, Inc., Motorola Satellite Communications, Inc., and TRW Inc. ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

King Videocable Company CUID No. CA0495
Lake Elsinore, California

Benchmark Filing To Support
Cable Programming Service Price

MEMORANDUM OPINION AND ORDER

Adopted: February 21, 1995; Released: February 23, 1995

By the Deputy Chief, Cable Services Bureau:

I. INTRODUCTION

1. Here we consider a complaint about the price King Videocable Company ("King") was charging for its cable programming service ("CPS") tier in Lake Elsinore, California, CUID No. CA0495. King has attempted to justify its price through a benchmark showing on FCC Form 393. This Order addresses the reasonableness of King's price only through May 14, 1994. At a later time we will issue a separate order addressing the reasonableness of the price after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

II. PROCEDURAL MATTERS

4. The first valid CPS complaint was completed and served on King on January 7, 1994. The Commission received the complaint on January 19, 1994.

5. King attempted to justify its CPS price through an FCC Form 393 filed on February 7, 1994. King amended its justification on June 30, 1994 in response to a Cable Services Bureau Order citing common deficiencies observed in benchmark filings generally,[11] and on January 24, 1995, in response to a Cable Services Bureau Public Notice offering operators the opportunity to make optional supplemental filings.[12]

III. DISCUSSION

6. In its amended benchmark filing of June 30, 1994, King calculated a maximum permitted price for the CPS tier of $7.32 per month. Upon review of King's filing, we have found no apparent errors that would require a recalculation of King's maximum permitted CPS price. However, King's actual price for the CPS tier was $7.40 per month. Thus, King has failed to demonstrate that its price for the CPS tier was not unreasonable.

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[1] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent King has sought to take advantage of the refund deferral period under the *Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking*, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (1994) (*"Second Order on Reconsideration"*), the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which King implemented its CPS price under the new regulations. *See* para. 3, *infra*. Further, to the extent that the price for the period ending May 14, 1994 is found to be excessive, a reduction in King's price for the period after May 14, 1994 may be required to reflect the fact that King's price during the earlier period, which is used as the starting point to calculate its price for the prospective period, was unreasonable. 47 C.F.R. §76.922(b)(4)(c).

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] *Order* in MM Docket No. 92-266, *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[11] *Cable Operators' Rate Justification Filings*, DA 94-526, 9 FCC Rcd 7752 (Cab. Serv. Bur. 1994).

[12] *Public Notice: Cable Services Bureau Announces Optional Procedures with Respect to Pending Pre-May 15 Benchmark Cases*, DA 94-1556 (Dec. 29, 1994); *see also Public Notice: Cable Services Bureau Announces Extension of Time to File Under Optional Procedures Plan with Respect to Pending Pre-May 15 Benchmark Cases*, DA 95-87 (Jan. 20, 1995).

IV. CONCLUSIONS

7. Upon review of the record herein, we conclude that King's showing supports a maximum reasonable CPS tier price of $7.32 per month (plus franchise fee) for the period January 19, 1994 to May 14, 1994.[13] However, we further determine that the refund at issue is such a de minimis amount that it would not serve the public interest to order a refund.

8. We further conclude that King must reflect in its FCC Form 1200 rate filing for the period after May 14, 1994 the fact that King's price during the earlier period was unreasonable.[14] We reserve the right to make further adjustments to King's prices for the period after May 14, 1994 upon completion of our review of King's FCC Form 1200 rate filing.

9. We further conclude that King has submitted in good faith a timely optional supplemental filing in response to our December 29, 1994 Public Notice.[15] As provided in the Public Notice, we will relieve King of its obligation to obtain advance Commission approval of adjustments to its CPS price for one year following the release of this Order.

10. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the January 7, 1994 complaint against the cable programming service price charged by King Videocable Company in Lake Elsinore, California, CUID No. CA0495, IS GRANTED TO THE EXTENT INDICATED HEREIN AND DENIED TO THE EXTENT INDICATED HEREIN.

11. IT IS FURTHER ORDERED that the benchmark filing submitted by King Videocable Company with respect to Lake Elsinore, California, CUID No. CA0495, for the period of January 19, 1994 to May 14, 1994, justifies a maximum price of $7.32 per month (plus franchise fee) for the cable programming service tier.

12. IT IS FURTHER ORDERED, pursuant to Section 76.922(b)(4)(C) of the Commission's Rules, 47 C.F.R. § 76.922(b)(4)(C), that King Videocable Company shall, within 30 days of the release of this Order, revise its Form 1200 filing with respect to Lake Elsinore, California, CUID No. CA0495, for the period beginning May 15, 1994, to reduce the monthly charge per tier as of March 31, 1994 for Tier 2 (Line A6b) to equal the maximum permitted rate (plus franchise fee).

13. IT IS FURTHER ORDERED that King Videocable Company shall place into effect, within 30 days after its submission of the revised Form 1200 filing required above, a CPS tier price that reflects the reduction in the CPS rate determined in this Order.

14. IT IS FURTHER ORDERED, pursuant to Section 76.960 of the Commission's rules, 47 C.F.R. § 76.960, that King Videocable Company shall not be required to obtain advance Commission approval of adjustments to its CPS price for one year following the release of this Order.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Deputy Chief, Cable Services Bureau

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[13] This finding is based solely on the representations of King listed in paragraph 5, *supra*. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

[14] We reviewed King's FCC Form 1200 rate filing and confirmed that King calculated its rates for the period after May 14, 1994 using the rate that we find in this Order to be unreasonable.

[15] *Public Notice: Cable Services Bureau Announces Optional Procedures with Respect to Pending Pre-May 15 Benchmark Cases*, DA 94-1556 (Dec. 29, 1994).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Viacom Cable Sonoma, California, System — CUID Nos. CA0110, CA0111, CA0112, CA1513

Benchmark Filings to Support Cable Programming Service Prices

MEMORANDUM OPINION AND ORDER

Adopted: February 17, 1995; Released: February 21, 1995

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. Here we consider complaints about the prices Viacom Cable ("Viacom") was charging for its cable programming service ("CPS") tier in the communities designated by the CUID numbers referenced above which are served by Viacom's Sonoma, California System. Viacom has chosen to attempt to justify its prices through benchmark showings on FCC Form 393. This Order addresses the reasonableness of Viacom's prices only through May 14, 1994. At a later date we will issue a separate order addressing the reasonableness of the prices after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

II. PROCEDURAL MATTERS

4. The first valid CPS complaints in the franchise areas which are the subject of this Order were completed and served on Viacom and received by the Commission on the dates set forth on Appendix A.

5. Viacom filed its first FCC Form 393 filings for the franchise areas which are the subject of this Order on December 13, 1993. Viacom filed amended FCC Form 393 filings for Windsor, California, CUID No. CA1513, on February 22, 1994, to reflect the assignment of CUID No. CA1513 to Windsor; and on April 18, 1994, to respond to a Notice from the Town of Windsor. Viacom filed amended FCC Form 393 filings on June 27, 1994, for Cloverdale, California, CUID No. CA0110, and Sonoma County, California-H-C-G Cablevision Inc., CUID No. CA0112; on June 28, 1994, for Windsor, California, CUID No. CA1513; on June 27, 1994 and September 6, 1994, for Healdsburg, California, CUID No. CA0111, in response to a Cable Services Bureau Order citing common deficiencies observed in benchmark filings generally[11] and on February 8, 1995 for all areas in response to a Cable Services Bureau Public Notice offering operators the opportunity to make optional supplemental filings.[12]

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[1] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Viacom has sought to take advantage of the refund deferral period under the *Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking*, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (1994) (*"Second Order on Reconsideration"*), the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which Viacom implemented its CPS prices under the new regulations. *See* para. 3, *infra*. Further, to the extent that the prices for the period ending May 14, 1994 are found to be excessive, reductions in Viacom's prices for the period after May 14, 1994 may be required to reflect the fact that Viacom's prices during the earlier period, which are used as the starting point to calculate its prices for the prospective period, were unreasonable. *See* 47 C.F.R. § 76.922(b)(4)(C).

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] *Order* in MM Docket No. 92-266, *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] *See Second Order on Reconsideration* at 4119; 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration* at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration* at 4189 n.195.

[11] *Cable Operators' Rate Justification Filings*, DA 94-526, 9 FCC Rcd 7752 (Cab. Serv. Bur. 1994).

[12] Public Notice: Cable Services Bureau Announces Optional Procedures with Respect to Pending Pre-May 15 Benchmark Cases, DA 94-1556 (Dec. 29, 1994); *see also Public Notice: Cable Services Bureau Announces Extension of Time to File Under Optional Procedures Plan with Respect to Pending Pre-May 15 Benchmark Cases*, DA 95-87 (Jan. 20, 1995).

III. DISCUSSION

6. Viacom asserts that its monthly CPS tier prices are justified by its benchmark filings because its prices are lower than the maximum permitted charges as calculated in the filings. However, upon review we have determined that Viacom has not correctly calculated its maximum permitted prices, and it is therefore appropriate to make the following adjustment to Viacom's calculations in its Form 393 filings prior to February 8, 1995:

a. In its amended filings, Viacom states that it calculated the Inflation Adjustment Factor (Form 393, Part II, Worksheet 1, Line 127, and Form 393, Part II, Worksheet 4, Line 401) using data it relied on when it set its CPS prices. If Viacom had done so correctly (i.e., if it had completed Form 393 with accurate data, including the most recent inflation data available as of the time it set its prices), and if based on this data Form 393 indicated that its prices were reasonable, then Viacom would have successfully justified its prices under paragraph 94 of the *Third Order on Reconsideration*.[13] However, the figures Viacom used are not consistent with data on which it should have relied in setting its CPS prices. Specifically, Viacom used data released by the U.S. Department of Commerce on August 31, 1993, to complete Lines 122 and 125, but used earlier data to calculate the Inflation Factor on Line 123. Furthermore, Viacom claimed Adjustment Time Periods extending through November 1993, March 1994 and August 1994 (Line 124), which are inconsistent with an attempt to justify rates based on August 1993 data. Viacom's calculation of the Inflation Adjustment Factors are thus incorrect.

b. We must therefore recalculate the Inflation Adjustment Factor on the basis of the most accurate data currently available for the date on which Viacom initially filed.[14] On its amended Form 393 filings for CUID Nos. CA0110 and CA0112, Viacom entered 14 months on line 124, indicating that these filings were as of the end of November 1993. On its Form 393 filings for CUID Nos. CA0111 and CA1513, Viacom entered 18 months and 23 months, respectively, indicating that these filings were as of the end of March 1994 and August 1994. However, Viacom's use of the 18 months and the 23 months entries is impermissible. Viacom was required to file a justification of its CPS prices for all of these CUIDs no later than December 13, 1994.[15] Since Viacom filed its initial FCC Form 393s by that date, the instructions to Form 393 required it to calculate the inflation adjustments only through November 1993.[16] Viacom cannot be permitted to claim an additional inflation adjustment simply because it filed amended Form 393s at later dates. On July 29, 1994, the Department of Commerce released corrected inflation data including Gross National Product Price Index (GNP-PI) figures of 122.3 for the third quarter of 1992 and 125.7 for the third quarter of 1993. Using these GNP-PI figures, we calculate an Inflation Adjustment Factor through November 1993, the base date Viacom should have used in justifying its rates, of 1.032. This adjustment is consistent with the Inflation Adjustment Factor that Viacom used in its optional filing of February 8, 1995.

c. In its February 8, 1995 optional filing, Viacom reduced the number of satellite channels as of the initial date of regulation that it used to calculate the benchmark on Form 393, Part II, Worksheet 1, Line 121 from 22 to 21 and also reduced the number of satellite channels as of September 30, 1992 that Viacom used to calculate the benchmark on Form 393, Part II, Worksheet 2, Line 220 from 21 to 20. We rely on these revisions to recompute Viacom's maximum permitted rate.

7. Because of these errors, we conclude that Viacom has failed to demonstrate that its prices for the CPS tier were not unreasonable. We will therefore set prices for this tier, incorporating the adjustments discussed above. These adjustments have the effect of reducing the maximum permitted monthly CPS tier price for each franchise area to the levels set forth in Appendix B.

IV. CONCLUSIONS

8. Upon review of the record herein, we conclude that Viacom's showing supports the maximum reasonable CPS tier price for each franchise area set forth in Appendix A (plus franchise fee) for the period from the filing of the earliest complaint in each franchise area (as set forth in Appendix A) to May 14, 1994.[17] With respect to Healdsburg, California, CUID No. CA0111, we determine that the refund at issue is such a de minimis amount that it would not serve the public interest to order a refund. With respect to the other franchise areas addressed herein, we will order appropriate refunds pursuant to Section 76.957 of the Commission's Rules, 47 C.F.R. § 76.957, in order to reimburse subscribers for the amount they paid in excess of a reasonable price.

9. We further conclude that Viacom must reflect in its FCC Form 1200 rate filings for the period after May 14, 1994 the fact that Viacom's prices during the earlier period were unreasonable.[18] We reserve the right to make further

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[13] *Third Order on Reconsideration*, MM Docket Nos. 92-266 and 92-262 , FCC 94-40, 9 FCC Rcd 4316 (1994) ("*Third Order on Reconsideration*").

[14] *See* 47 C.F.R. § 76.922(b)(9)(iii) (if a cable operator fails to justify its rates, rates must be adjusted in accordance with the most accurate data available at the time of analysis).

[15] 47 C.F.R. § 76.956(a) (operator must file a response within 30 days of the date of service of a complaint).

[16] FCC Form 393, page 11, instructions for line 124 Inflation Adjustment Factor is calculated using "the number of whole months from September 30, 1992 to the date you will submit this form").

[17] This finding is based solely on the representations of Viacom listed in paragraph 5, *supra*, and the modifications described in paragraph 6, *supra*. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

[18] We reviewed Viacom's FCC Form 1200 rate filings and confirmed that Viacom calculated its rates for the period after May 14, 1994 using the rates that we find in this Order to be unreasonable.

adjustments to Viacom's prices for the period after May 14, 1994, upon completion of our review of Viacom's FCC Form 1200 rate filings.

10. We further conclude that Viacom has submitted in good faith an optional supplemental filing in response to our December 29, 1994 Public Notice.[19] As provided in the Public Notice, we will relieve Viacom of its obligation to obtain advance Commission approval of adjustments to its CPS prices for one year following the release of this Order.

11. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the complaints referred to in Appendix A against the cable programming service prices charged by Viacom Cable in Cloverdale, California, CUID No. CA0110; Healdsburg, California, CUID No. CA0111; Sonoma County, California-H-C-G Cablevision Inc., CUID No. CA0112; and Windsor, California, CUID No. CA1513, and all other complaints in these franchise areas related to the same prices, ARE GRANTED TO THE EXTENT INDICATED HEREIN.

12. IT IS FURTHER ORDERED that the benchmark filings submitted by Viacom Cable with respect to Cloverdale, California, CUID No. CA0110; Healdsburg, California, CUID No. CA0111; Sonoma County, California-H-C-G Cablevision Inc., CUID No. CA0112; and Windsor, California, CUID No. CA1513, for the period beginning with the filing of the first valid complaint in each franchise area and ending on May 14, 1994, as set forth on Appendix A, justify the maximum price in each franchise area set forth in Appendix B (plus franchise fee) for Viacom Cable's cable programming service tier.

13. IT IS FURTHER ORDERED, pursuant to Section 76.961 of the Commission's Rules, 47 C.F.R. § 76.961, that Viacom Cable shall refund to subscribers in Cloverdale, California, CUID No. CA0110; Sonoma County, California-H-C-G Cablevision Inc., CUID No. CA0112; and Windsor, California, CUID No. CA1513 that portion of the amounts paid for cable programming service for the period from the filing of the first valid complaint in each franchise area (as set forth on Appendix A)[20] to May 14, 1994 which exceeded the maximum price for each franchise area set forth in Appendix B (plus franchise fee) per month and was thus unreasonable, plus interest to the date of the refund.

14. IT IS FURTHER ORDERED that Viacom Cable shall promptly determine the overcharges to CPS subscribers for the stated periods, and shall within 30 days of the release of this Order file a report with the Chief, Cable Services Bureau, stating the cumulative refund amount so determined (including franchise fees and interest), describing the calculation thereof, and describing its plan to implement the refund within 60 days of Commission approval thereof.

15. IT IS FURTHER ORDERED, pursuant to Section 76.922(b)(4)(C) of the Commission's rules, 47 C.F.R. § 76.922(b)(4)(C), that Viacom Cable shall, within 30 days of the release of this Order, revise its Form 1200 filings with respect to Cloverdale, California, CUID No. CA0110; Healdsburg, California, CUID No. CA0111; Sonoma County, California-H-C-G Cablevision Inc., CUID No. CA0112; and Windsor, California, CUID No. CA1513, for the period beginning May 15, 1994, to reduce the monthly charge per tier as of March 31, 1994 for Tier 2 (Line A6b) to equal the maximum price in each franchise area set forth in Appendix B (plus franchise fee).

16. IT IS FURTHER ORDERED that Viacom Cable shall place into effect, within 30 days after its submission of the revised Form 1200 filings required above, prices that reflect the reductions in the CPS rates determined in this Order.

17. IT IS FURTHER ORDERED, pursuant to Section 76.960 of the Commission's rules, 47 C.F.R. § 76.960, that Viacom Cable shall not be required to obtain advance Commission approval of adjustments to its CPS prices for one year following the release of this Order.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

Appendix A

CUID No.	Date First Complaint Filed with FCC	Date Complaint Served
0110	11/15/93	11/13/93
0111	11/15/93	11/13/93
0112	11/15/93	11/13/93
1513	11/16/93	11/11/93

Appendix B

CUID No.	Actual Rates	Maximum Reasonable Rates
0110	$11.02	$10.85
0111	$11.08	$11.05
0112	$11.14	$10.91
1513	$11.14	$10.89

[19] Public Notice: Cable Services Bureau Announces Optional Procedures with Respect to Pending Pre-May 15 Benchmark Cases, DA 94-1556 (Dec. 29, 1994).

[20] Our jurisdiction to order a refund dates from the earliest date a valid complaint is filed with the Commission. 47 C.F.R. § 76.961(b).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Viacom Cable	CUID Nos. CA0195, CA0196,
Oroville, California,	CA0383, CA0384, CA0512,
System	CA0718, CA0724, CA1117

Benchmark Filings to Support
Cable Programming Service Prices

MEMORANDUM OPINION AND ORDER

Adopted: February 17, 1995; Released: February 21, 1995

By the Chief, Cable Services Bureau:

INTRODUCTION

1. Here we consider complaints about the prices Viacom Cable ("Viacom") was charging for its cable programming service ("CPS") tier in the franchise areas designated by the CUID numbers referenced above on its Oroville, California system. Viacom has chosen to attempt to justify its prices through benchmark showings on FCC Form 393. This Order addresses the reasonableness of Viacom's prices only through May 14, 1994. At a later date we will issue a separate order addressing the reasonableness of the prices after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

II. PROCEDURAL MATTERS

4. The first valid CPS complaints in the franchise areas addressed in this Order were completed and served on Viacom and received by the Commission on the dates set forth in Appendix A.

5. Viacom filed its first FCC Form 393 filing for the City of Oroville, California, CUID No. CA0196, on December 8, 1993. Viacom filed its first FCC Form 393 filing for the City of Colusa, California, CUID No. CA0383, on December 15, 1993. Viacom filed its first FCC Form 393 filings for Butte County-Oroville, CUID No. CA0195; Colusa County, California, CUID No. CA0384; the City of Paradise, California, CUID No. CA0512; the City of Gridley, California, CUID No. CA0718; the City of Biggs, California, CUID No. CA0724; and Butte County-Paradise, CUID No. CA1117, on December 13, 1993. Viacom filed amended FCC Form 393 filings for each franchise area on June 27, 1994 in response to a Cable Services Bureau Order citing common deficiencies observed in benchmark filings generally[11] and on February 8, 1995 in response to a Cable Services Bureau Public Notice offering operators the opportunity to make optional supplemental filings.[12]

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[1] The findings in this Order do not in any way prejudge the reasonableness of the prices for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Viacom has sought to take advantage of the refund deferral period under the *Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking*, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (1994) (*"Second Order on Reconsideration"*), the maximum permitted CPS prices determined herein might also apply from May 15, 1994 until the date on which Viacom implemented its CPS prices under the new regulations. *See* para. 3, *infra*. Further, to the extent that the prices for the period ending May 14, 1994 are found to be excessive, reductions in Viacom's prices for the period after May 14, 1994 may be required to reflect the fact that Viacom's prices during the earlier period, which are used as the starting point to calculate its prices for the prospective period, were unreasonable. *See* 47 C.F.R. § 76.922(b)(4)(C).

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] *Order* in MM Docket No. 92-266, *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] *See Second Order on Reconsideration* at 4119; 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration* at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration* at 4189 n.195.

[11] *Cable Operators' Rate Justification Filings*, DA 94-526, 9 FCC Rcd 7752 (Cab. Serv. Bur. 1994).

[12] *Public Notice: Cable Services Bureau Announces Optional Procedures with Respect to Pending Pre-May 15 Benchmark Cases, DA 94-1556 (Dec. 29, 1994); see also Public Notice: Cable Services Bureau Announces Extension of Time to File Under Optional Procedures Plan with Respect to Pending Pre-May 15 Benchmark Cases*, DA 95-87 (Jan. 20, 1995).

III. DISCUSSION

6. Viacom asserts that its monthly CPS tier prices are justified by its benchmark filings because its prices are lower than the maximum permitted charges as calculated in the filings. However, upon review we have determined that Viacom has not correctly calculated its maximum permitted prices, and it is therefore appropriate to make the following adjustments to Viacom's calculations in its Form 393 filings of June 27, 1994:

a. On Line 208 of Form 393, Part II, Worksheet 2 for Butte County-Oroville, CUID No. CA0195; the City of Oroville, CUID No. CA0196; the City of Colusa, CUID No. CA0383; and Colusa County, CUID No. CA0384, Viacom entered a monthly franchise fee expense. The instructions to Form 393 provide that franchise fees are to be deducted on Line 208 only if they are included in the charges listed on Form 393, Part II, Worksheet 2, Line 201. However, in its responses to complaints concerning rates for Cable Programming Services provided in each of the franchise areas addressed in this Order, Viacom stated that the September 30, 1992 rate that appears on Line 201 was "before the [franchise fee] pass-through." In addition, Viacom provided a schedule reconciling the rates shown on Line 201 with the rates charged to customers, including the addition of the franchise fee. Accordingly, we reduce Viacom's Line 208 entry to $0.00.

b. In its amended filings of June 27, 1994, Viacom states that it calculated the Inflation Adjustment Factor (Form 393, Part II, Worksheet 1, Line 127, and Form 393, Part II, Worksheet 4, Line 401) using data it relied on when it set its CPS prices. If Viacom had done so correctly (i.e., if it had completed Form 393 with accurate data, including the most recent inflation data available as of the time it set its prices), Viacom would have successfully justified its prices under paragraph 94 of the *Third Order on Reconsideration*.[13] However, the figures Viacom used are not consistent with data on which it should have relied in setting its CPS prices. Specifically, Viacom used data released by the U.S. Department of Commerce on August 31, 1993, to complete Lines 122 and 125, but used earlier data to calculate the Inflation Factor on Line 123. Furthermore, Viacom claimed an Adjustment TimePeriod extending through November 1993 (Line 124), which is inconsistent with an attempt to justify rates based on August 1993 data. Viacom's calculation of the Inflation Adjustment Factor is thus incorrect.

c. We must therefore recalculate the Inflation Adjustment Factor on the basis of the most accurate data currently available for the date on which Viacom filed.[14] On its amended Forms 393, Viacom entered 14 months on Line 124, indicating that these filings were as of the end of November 1993. On July 29, 1994, the Department of Commerce released corrected inflation data including Gross National Product Price Index (GNP-PI) figures of 122.3 for the third quarter of 1992 and 125.7 for the third quarter of 1993. Using these GNP-PI figures, we calculate an Inflation Adjustment Factor of 1.032 through November 1993, the base date Viacom used in justifying its rates. This adjustment is consistent with the Inflation Adjustment Factor that Viacom used in its optional filing of February 8, 1995.

7. Because of these errors, we conclude that, except in the City of Oroville, CUID No. CA0196, Viacom has failed to demonstrate that its prices for the CPS tier were not unreasonable.[15] We will therefore set prices for this tier, incorporating the adjustments discussed above. These adjustments have the effect of reducing the maximum permitted monthly CPS tier price for each franchise area to the levels set forth in Appendix B.

IV. CONCLUSIONS

8. Upon review of the record herein, we conclude that Viacom's showing supports the maximum reasonable CPS tier price for each franchise area set forth in Appendix B (plus franchise fee) for the period from the filing of the earliest complaint in each franchise area (as set forth on Appendix A) to May 14, 1994.[16] For the City of Oroville, CUID No. CA0196, we conclude that Viacom's showing supports as reasonable its actual CPS price of $12.16 per month (plus franchise fee). We further determine that we will order appropriate refunds pursuant to Section 76.957 of the Commission's Rules, 47 C.F.R. § 76.957, in order to reimburse subscribers for the amount they paid in excess of a reasonable price.

9. We further conclude that Viacom must reflect in its FCC Form 1200 rate filings for the period after May 14, 1994 the fact that, in most of the franchise areas which are the subject of this Order, Viacom's prices during the earlier period were unreasonable.[17] We reserve the right to make further adjustments to Viacom's prices for the period after May 14, 1994, upon completion of our review of Viacom's FCC Form 1200 rate filings.

10. We further conclude that Viacom has submitted in good faith an optional supplemental filing in response to our December 29, 1994 Public Notice.[18] As provided in the

[13] *Third Order on Reconsideration*, MM Docket Nos. 92-266 and 92-262 , FCC 94-40, 9 FCC Rcd 4316 (1994) (*"Third Order on Reconsideration"*).

[14] *See* 47 C.F.R. § 76.922(b)(9)(iii) (if a cable operator fails to justify its rates, rates must be adjusted in accordance with the most accurate data available at the time of analysis).

[15] In the City of Oroville, correction of Viacom's errors does not result in a reduction in Viacom's maximum permitted CPS tier price.

[16] This finding is based solely on the representations of Viacom listed in paragraph 5, *supra*, and the modifications described in paragraph 6, *supra*. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

[17] We reviewed Viacom's FCC Form 1200 rate filings and confirmed that Viacom calculated its rates for the period after May 14, 1994 using the rates that we find in this Order to be unreasonable.

[18] Public Notice: Cable Services Bureau Announces Optional Procedures with Respect to Pending Pre-May 15 Benchmark Cases, DA 94-1556 (Dec. 29, 1994).

Public Notice, we will relieve Viacom of its obligation to obtain advance Commission approval of adjustments to its CPS prices for one year following the release of this Order.

11. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the complaints referred to in Appendix A against the cable programming service prices charged by Viacom Cable in Butte County-Oroville, California, CUID No. CA0195; the City of Colusa, California, CUID No. CA0383; Colusa County, California, CUID No. CA0384; the City of Paradise, California, CUID No. CA0512; the City of Gridley, California, CUID No. CA0718; the City of Biggs, California, CUID No. CA0724; and Butte County-Paradise, California, CUID No. CA1117, and all other complaints in these franchise areas related to the same prices, ARE GRANTED TO THE EXTENT INDICATED HEREIN.

12. IT IS FURTHER ORDERED that the November 17, 1993 complaint against the cable programming service price charged by Viacom Cable in the City of Oroville, CUID No. CA0196, and all other complaints relating to the same price, ARE DENIED TO THE EXTENT INDICATED HEREIN.

13. IT IS FURTHER ORDERED that the benchmark filings submitted by Viacom Cable with respect to Butte County-Oroville, California, CUID No. CA0195; the City of Oroville, California, CUID No. CA0196; the City of Colusa, California, CUID No. CA0383; Colusa County, California, CUID No. CA0384; the City of Paradise, California, CUID No. CA0512; the City of Gridley, California, CUID No. CA0718; the City of Biggs, California, CUID No. CA0724; and Butte County-Paradise, California, CUID No. CA1117, for the period beginning with the filing of the first valid complaint in each franchise area and ending on May 14, 1994, as set forth on Appendix A, justify the maximum price in each franchise area set forth in Appendix B (plus franchise fee) for Viacom Cable's cable programming service tier.

14. IT IS FURTHER ORDERED, pursuant to Section 76.961 of the Commission's Rules, 47 C.F.R. § 76.961, that Viacom Cable shall refund to subscribers that portion of the amounts paid for cable programming service for the period from the filing of the first valid complaint in each franchise area (as set forth on Appendix (A)[19] to May 14, 1994 which exceeded the maximum price for each franchise area set forth in Appendix B (plus franchise fee) per month and was thus unreasonable, plus interest to the date of the refund.

15. IT IS FURTHER ORDERED that Viacom Cable shall promptly determine the overcharges to CPS subscribers for the stated periods, and shall within 30 days of the release of this Order file a report with the Chief, Cable Services Bureau, stating the cumulative refund amount so determined (including franchise fees and interest), describing the calculation thereof, and describing its plan to implement the refund within 60 days of Commission approval thereof.

16. IT IS FURTHER ORDERED, pursuant to Section 76.922(b)(4)(C) of the Commission's rules, 47 C.F.R. § 76.922(b)(4)(C), that Viacom Cable shall, within 30 days of the release of this Order, revise its Form 1200 filings with respect to Butte County-Oroville, California, CUID No. CA0195; the City of Colusa, California, CUID No. CA0383; Colusa County, California, CUID No. CA0384; the City of Paradise, California, CUID No. CA0512; the City of Gridley, California, CUID No. CA0718; the City of Biggs, California, CUID No. CA0724; and Butte County-Paradise, California, CUID No. CA1117, for the period beginning May 15, 1994, to reduce the monthly charge per tier as of March 31, 1994 for Tier 2 (Line A6b) to equal the maximum price in each franchise area set forth in Appendix B (plus franchise fee).

17. IT IS FURTHER ORDERED that Viacom Cable shall place into effect, within 30 days after its submission of the revised Form 1200 filings required above, prices that reflect the reductions in the CPS rates determined in this Order.

18. IT IS FURTHER ORDERED, pursuant to Section 76.960 of the Commission's rules, 47 C.F.R. § 76.960, that Viacom Cable shall not be required to obtain advance Commission approval of adjustments to its CPS prices for one year following the release of this Order.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

Appendix A

CUID No.	Date First Complaint Filed with FCC	Date Complaint Served
0195	11/16/93	11/13/93
0196	11/17/93	11/8/93
0383	11/18/93	11/15/93
0384	11/15/93	11/13/93
0512	11/17/93	11/13/93
0718	11/18/93	11/13/93
0724	11/16/93	11/13/93
1117	11/16/93	11/13/93

Appendix B

CUID No.	Actual Rates	Maximum Reasonable Rates
0195	$12.20	$11.98
0383	$11.90	$11.75
0384	$11.90	$11.77
0512	$12.45	$12.34

[19] Our jurisdiction to order a refund dates from the earliest date a valid complaint is filed with the Commission. 47 C.F.R. § 76.961(b).

0718	$11.90	$11.80
0724	$11.90	$11.78
1117	$12.45	$12.32

PUBLIC NOTICE

FEDERAL COMMUNICATIONS COMMISSION
1919 M STREET N.W.
WASHINGTON, D.C. 20554

51303

News media information 202/632-5050. Recorded listing of releases and texts 202/632-0002.

DA 94-1567

December 21, 1994

WIRELESS TELECOMMUNICATIONS BUREAU SEEKS COMMENT ON MOTOROLA'S REQUEST FOR COMMISSION CONSENT TO ASSIGN LICENSES TO NEXTEL COMMUNICATIONS, INC.

On December 9, 1994, Motorola, Inc. ("Motorola") submitted an application seeking the Commission's consent to assign certain 800 MHz SMR licenses held by Motorola and its subsidiaries to Nextel Communications, Inc. ("Nextel") pursuant to Section 90.153 of the Commission's rules, 47 C.F.R. § 90.153. As described in Motorola's application, Motorola seeks Commission consent to assign its SMR licenses to nine different Nextel subsidiaries.

The Wireless Telecommunications Bureau is reviewing Motorola's applications to determine whether the proposed assignment to Nextel is in the public interest, convenience, or necessity. *See* 47 C.F.R. §90.153. To assist in this determination, the Bureau solicits comments on all aspects of Motorola's proposed assignment to Nextel. Comments should be filed on or before January 13, 1995. Reply comments should be filed on or before January 20, 1995. Comments and reply comments should be addressed to: Legal Branch, Commercial Mobile Radio Services Division, Telecommunications Bureau, Room 5202, STOP 1700A1, Federal Communications Commission, Washington, D.C. 20554. Copies of the above-referenced filings may be obtained from the Commission's copy contractor, ITS, Inc., 2100 M Street, N.W., Suite 140, (202) 857-3800. Copies are also available for public inspection in Room 5202, 2025 M Street, N.W., Washington, D.C. 20554.

For further information contact the Commercial Radio Division, Legal Branch at (202) 418-0620.

--FCC--

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

King Videocable Company CUID No. CA0270
Placerville, California

Benchmark Filing To Support
Cable Programming Service Price

MEMORANDUM OPINION AND ORDER

Adopted: February 21, 1995; Released: February 23, 1995

By the Deputy Chief, Cable Services Bureau:

I. INTRODUCTION

1. Here we consider a complaint about the price King Videocable Company ("King") was charging for its cable programming service ("CPS") tier in Placerville, California, CUID No. CA0270. King has attempted to justify its price through a benchmark showing on FCC Form 393. This Order addresses the reasonableness of King's price only through May 14, 1994. At a later time we will issue a separate order addressing the reasonableness of the price after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

II. PROCEDURAL MATTERS

4. The first valid CPS complaint was completed and served on King on January 27, 1994. The Commission received the complaint on February 1, 1994.

5. King attempted to justify its CPS price through an FCC Form 393 filed on March 11, 1994. King amended its justification on June 29, 1994 in response to a Cable Services Bureau Order citing common deficiencies observed in benchmark filings generally,[11] and on January 24, 1995, in response to a Cable Services Bureau Public Notice offering operators the opportunity to make optional supplemental filings.[12]

III. DISCUSSION

6. In its amended benchmark filing of June 29, 1994, King calculated a maximum permitted price for the CPS tier of $8.85 per month. Upon review of King's filing, we have found no apparent errors that would require a recalculation of King's maximum permitted CPS price. However, King's actual price for the CPS tier was $8.92 per month. Thus, King has failed to demonstrate that its price for the CPS tier was not unreasonable.

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[1] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent King has sought to take advantage of the refund deferral period under the *Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking*, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (1994) (*"Second Order on Reconsideration"*), the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which King implemented its CPS price under the new regulations. *See* para. 3, *infra*. Further, to the extent that the price for the period ending May 14, 1994 is found to be excessive, a reduction in King's price for the period after May 14, 1994 may be required to reflect the fact that King's price during the earlier period, which is used as the starting point to calculate its price for the prospective period, was unreasonable. 47 C.F.R. §76.922(b)(4)(c).

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] *Order* in MM Docket No. 92-266, *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[11] *Cable Operators' Rate Justification Filings*, DA 94-526, 9 FCC Rcd 7752 (Cab. Serv. Bur. 1994).

[12] *Public Notice: Cable Services Bureau Announces Optional Procedures with Respect to Pending Pre-May 15 Benchmark Cases*, DA 94-1556 (Dec. 29, 1994); *see also Public Notice: Cable Services Bureau Announces Extension of Time to File Under Optional Procedures Plan with Respect to Pending Pre-May 15 Benchmark Cases*, DA 95-87 (Jan. 20, 1995).

IV. CONCLUSIONS

7. Upon review of the record herein, we conclude that King's showing supports a maximum reasonable CPS tier price of $8.85 per month (plus franchise fee) for the period February 1, 1994 to May 14, 1994.[13] However, we further determine that the refund at issue is such a de minimis amount that it would not serve the public interest to order a refund.

8. We further conclude that King must reflect in its FCC Form 1200 rate filing for the period after May 14, 1994 the fact that King's price during the earlier period was unreasonable.[14] We reserve the right to make further adjustments to King's prices for the period after May 14, 1994 upon completion of our review of King's FCC Form 1200 rate filing.

9. We further conclude that King has submitted in good faith a timely optional supplemental filing in response to our December 29, 1994 Public Notice.[15] As provided in the Public Notice, we will relieve King of its obligation to obtain advance Commission approval of adjustments to its CPS price for one year following the release of this Order.

10. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the January 27, 1994 complaint against the cable programming service price charged by King Videocable Company in Placerville, California, CUID No. CA0270, IS GRANTED TO THE EXTENT INDICATED HEREIN AND DENIED TO THE EXTENT INDICATED HEREIN.

11. IT IS FURTHER ORDERED that the benchmark filing submitted by King Videocable Company with respect to Placerville, California, CUID No. CA0270, for the period of February 1, 1994 to May 14, 1994, justifies a maximum price of $8.85 per month (plus franchise fee) for the cable programming service tier.

12. IT IS FURTHER ORDERED, pursuant to Section 76.922(b)(4)(C) of the Commission's Rules, 47 C.F.R. § 76.922(b)(4)(C), that King Videocable Company shall, within 30 days of the release of this Order, revise its Form 1200 filing with respect to Placerville, California, CUID No. CA0270, for the period beginning May 15, 1994, to reduce the monthly charge per tier as of March 31, 1994 for Tier 2 (Line A6b) to equal the maximum permitted rate (plus franchise fee).

13. IT IS FURTHER ORDERED that King Videocable Company shall place into effect, within 30 days after its submission of the revised Form 1200 filing required above, a CPS tier price that reflects the reduction in the CPS rate determined in this Order.

14. IT IS FURTHER ORDERED, pursuant to Section 76.960 of the Commission's rules, 47 C.F.R. § 76.960, that King Videocable Company shall not be required to obtain advance Commission approval of adjustments to its CPS price for one year following the release of this Order.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Deputy Chief, Cable Services Bureau

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[13] This finding is based solely on the representations of King listed in paragraph 5, *supra*. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

[14] We reviewed King's FCC Form 1200 rate filing and confirmed that King calculated its rates for the period after May 14, 1994 using the rate that we find in this Order to be unreasonable.

[15] *Public Notice: Cable Services Bureau Announces Optional Procedures with Respect to Pending Pre-May 15 Benchmark Cases*, DA 94-1556 (Dec. 29, 1994).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Colony Communications, Inc.	CUID Nos. MA0082, MA0147, WI0510, CA1288, CA1011, MA0099, NY0049, CA0057, CA0058, CA0740

Benchmark Filings To Support
Cable Programming Service Prices

MEMORANDUM OPINION AND ORDER

Adopted: February 21, 1995; Released: February 23, 1995

By the Deputy Chief, Cable Services Bureau:

I. INTRODUCTION

1. Here we consider complaints about the prices Colony Communications. Inc., through its subsidiary companies as shown on Appendix A (collectively "Colony."), was charging for its cable programming service ("CPS") tier in the communities designated by the CUID numbers referenced above and on Appendix A. Colony has attempted to justify its reasonableness of Colony's prices only through May 14, 1994. At a later time we will issue prices through benchmark showings on FCC Form 393. This Order addresses the a separate order addressing the reasonableness of the prices after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case. the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

II. PROCEDURAL MATTERS

4. The first complete and timely CPS complaint in each of the franchise areas addressed herein was completed and served on Colony and filed with the Commission on the dates set forth on Appendix A.

5. Colony attempted to justify its CPS prices through FCC Forms 393 filed and amended[11] on the dates set forth on Appendix B. On Jaunuary 25, 1995, Colony made additional filings in response to a Cable Services Bureau Public Notice offering operators the opportunity to make optional supplemental filings.[12]

III. DISCUSSION

6. Colony asserts that its monthly CPS tier prices per subscriber as shown on Appendix C are justified by its benchmark filings because its prices are equal to or below the maximum permitted charges calculated in those filings. Upon review of Colony's Forms 393, we have found no apparent errors that would result in Colony's CPS tier prices exceeding its maximum permitted prices.

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[1] The findings in this Order do not in any way prejudge the reasonableness of the prices for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Colony has sought to take advantage of the refund deferral period under the *Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking*, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (1994) (*"Second Order on Reconsideration"*), the maximum permitted CPS prices determined herein might also apply from May 15, 1994 until the date on which Colony implemented its CPS prices under the new regulations. *See* para. 3, *infra*.

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] *Order* in MM Docket No. 92-266, *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[11] Colony amended its FCC Forms 393 in response to an Order citing common deficiencies observed in benchmark filings generally. *See Cable Operators' Rate Justification Filings*, DA 94-526, 9 FCC Rcd 7752 (Cab. Serv. Bur. 1994).

[12] *Public Notice: Cable Services Bureau Announces Optional Procedures with Respect to Pending Pre-May 15 Benchmark Cases*, DA 94-1556 (Dec. 29, 1994); *see also Public Notice: Cable Services Bureau Announces Extension of Time to File Under Optional Procedures Plan with Respect to Pending Pre-May 15 Benchmark Cases*, DA 95-87 (Jan. 20, 1995).

IV. CONCLUSIONS

7. Upon review of the record herein, we conclude that Colony's showing supports as reasonable its CPS tier prices as shown on Appendix C (plus franchise fee) for the period from the filing of the earliest complaint in each franchise area (as shown on Appendix A) to May 14, 1994.[13]

8. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the complaints referenced on Appendix A against the cable programming service prices charged by Colony Communications, Inc. through its subsidiary companies in the franchise areas identified on Appendix A, and all other complaints in these franchise areas relating to the same prices, ARE DENIED TO THE EXTENT INDICATED HEREIN.

9. IT IS FURTHER ORDERED that the benchmark filings submitted by Colony Communications, Inc. and its subsidiary companies with respect to the franchise areas set forth on Appendix A for the period from the filing of the earliest complaint in each franchise area (as shown on Appendix A) to May 14, 1994, justify the prices shown on Appendix C (plus franchise fee) for Colony Communications, Inc.'s cable programming service tier.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Deputy Chief, Cable Services Bureau

Appendix A

CUID No. & Subsidiary	Date First Complaint Filed With FCC	Date Complaint Served
Lowell Cable TV MA0082 Lowell	1/13/94	12/31/93
Lowell Cable TV MA0147 Chelmsford	11/26/93	11/22/93
King Videocable WI0510 River Falls	10/29/93	10/24/93
King Videocable CA1288 Murietta	1/11/94	1/7/94
Colony Cablevision CA1011 Lakewood	2/23/94	2/23/94
Colony Cablevision MA0099 Fall River	12/30/93	12/26/93
King Videocable NY0049 Woodbury	1/3/94	12/28/93
Palmer Cablevision CA0057 Indian Wells	9/7/93	9/4/93
Colony Cablevision CA0058 Palm Desert	2/23/94	2/23/94
Colony Cablevision CA0740 Rancho Mirage	1/21/94	1/14/94

Appendix B

CUID No.	Date First Form 393 Filed with FCC	Date of Amended Filing
MA0082	2/4/94	6/28/94
MA0147	12/23/93	6/29/94
WI0510	11/29/93	6/30/94
CA1288	1/27/94	6/30/94
CA1011	3/29/94	6/24/94
MA0099	2/4/94	6/30/94
NY0049	1/26/94	6/23/94
CA0057	11/16/93	6/27/94
CA0058	3/17/94	6/27/94
CA0740	3/28/94	6/27/94

Appendix C

CUID No.	CPS Tier Price
MA0082	$9.15
MA0147	$6.85
WI0510	$11.18
CA1288	$7.73
CA1011	$8.64
MA0099	$9.02
NY0049	$9.27
CA0057	$11.86
CA0058	$11.86
CA0740	$11.86

[13] This finding is based solely on the representations of Colony listed in paragraph 5, *supra*, and Appendix B. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

King Videocable Company CUID No. CA0273
Sutter Creek, California

Benchmark Filing To Support
Cable Programming Service Price

MEMORANDUM OPINION AND ORDER

Adopted: February 21, 1995; Released: February 23, 1995

By the Deputy Chief, Cable Services Bureau:

I. INTRODUCTION

1. Here we consider a complaint about the price King Videocable Company ("King") was charging for its cable programming service ("CPS") tier in Sutter Creek, California, CUID No. CA0273. King has attempted to justify its price through a benchmark showing on FCC Form 393. This Order addresses the reasonableness of King's price only through May 14, 1994. At a later time we will issue a separate order addressing the reasonableness of the price after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

II. PROCEDURAL MATTERS

4. The first valid CPS complaint was completed and served on King on December 23, 1993. The Commission received the complaint on December 28, 1993.

5. King attempted to justify its CPS price through an FCC Form 393 filed on January 26, 1994. King amended its justification on June 29, 1994 in response to a Cable Services Bureau Order citing common deficiencies observed in benchmark filings generally,[11] and on January 24, 1995, in response to a Cable Services Bureau Public Notice offering operators the opportunity to make optional supplemental filings.[12]

III. DISCUSSION

6. In its amended benchmark filing of June 29, 1994, King calculated a maximum permitted price for the CPS tier of $6.19 per month. Upon review of King's filing, we have found no apparent errors that would require a recalculation of King's maximum permitted CPS price. However, King's actual price for the CPS tier was $6.21 per month. Thus, King has failed to demonstrate that its price for the CPS tier was not unreasonable.

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[1] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent King has sought to take advantage of the refund deferral period under the *Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking*, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (1994) (*"Second Order on Reconsideration"*), the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which King implemented its CPS price under the new regulations. *See* para. 3, *infra*. Further, to the extent that the price for the period ending May 14, 1994 is found to be excessive, a reduction in King's price for the period after May 14, 1994 may be required to reflect the fact that King's price during the earlier period, which is used as the starting point to calculate its price for the prospective period, was unreasonable. 47 C.F.R. §76.922(b)(4)(c).

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] *Order* in MM Docket No. 92-266, *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[11] *Cable Operators' Rate Justification Filings*, DA 94-526, 9 FCC Rcd 7752 (Cab. Serv. Bur. 1994).

[12] *Public Notice: Cable Services Bureau Announces Optional Procedures with Respect to Pending Pre-May 15 Benchmark Cases*, DA 94-1556 (Dec. 29, 1994); *see also Public Notice: Cable Services Bureau Announces Extension of Time to File Under Optional Procedures Plan with Respect to Pending Pre-May 15 Benchmark Cases*, DA 95-87 (Jan. 20, 1995).

IV. CONCLUSIONS

7. Upon review of the record herein, we conclude that King's showing supports a maximum reasonable CPS tier price of $6.19 per month (plus franchise fee) for the period December 28, 1993 to May 14, 1994.[13] However, we further determine that the refund at issue is such a de minimis amount that it would not serve the public interest to order a refund.

8. We further conclude that King must reflect in its FCC Form 1200 rate filing for the period after May 14, 1994 the fact that King's price during the earlier period was unreasonable.[14] We reserve the right to make further adjustments to King's prices for the period after May 14, 1994 upon completion of our review of King's FCC Form 1200 rate filing.

9. We further conclude that King has submitted in good faith a timely optional supplemental filing in response to our December 29, 1994 Public Notice.[15] As provided in the Public Notice, we will relieve King of its obligation to obtain advance Commission approval of adjustments to its CPS price for one year following the release of this Order.

10. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the December 23, 1993 complaint against the cable programming service price charged by King Videocable Company in Sutter Creek, California, CUID No. CA0273, IS GRANTED TO THE EXTENT INDICATED HEREIN AND DENIED TO THE EXTENT INDICATED HEREIN.

11. IT IS FURTHER ORDERED that the benchmark filing submitted by King Videocable Company with respect to Sutter Creek, California, CUID No. CA0273, for the period of December 28, 1994 to May 14, 1994, justifies a maximum price of $6.19 per month (plus franchise fee) for the cable programming service tier.

12. IT IS FURTHER ORDERED, pursuant to Section 76.922(b)(4)(C) of the Commission's Rules, 47 C.F.R. § 76.922(b)(4)(C), that King Videocable Company shall, within 30 days of the release of this Order, revise its Form 1200 filing with respect to Sutter Creek, California, CUID No. CA0273, for the period beginning May 15, 1994, to reduce the monthly charge per tier as of March 31, 1994 for Tier 2 (Line A6b) to equal the maximum permitted rate (plus franchise fee).

13. IT IS FURTHER ORDERED that King Videocable Company shall place into effect, within 30 days after its submission of the revised Form 1200 filing required above, a CPS tier price that reflects the reduction in the CPS rate determined in this Order.

14. IT IS FURTHER ORDERED, pursuant to Section 76.960 of the Commission's rules, 47 C.F.R. § 76.960, that King Videocable Company shall not be required to obtain advance Commission approval of adjustments to its CPS price for one year following the release of this Order.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Deputy Chief, Cable Services Bureau

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[13] This finding is based solely on the representations of King listed in paragraph 5, *supra*. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

[14] We reviewed King's FCC Form 1200 rate filing and confirmed that King calculated its rates for the period after May 14, 1994 using the rate that we find in this Order to be unreasonable.

[15] *Public Notice: Cable Services Bureau Announces Optional Procedures with Respect to Pending Pre-May 15 Benchmark Cases*, DA 94-1556 (Dec. 29, 1994).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

King Videocable Company CUID No. CA0637
Amador County, California

Benchmark Filing To Support
Cable Programming Service Price

MEMORANDUM OPINION AND ORDER

Adopted: February 21, 1995; Released: February 23, 1995

By the Deputy Chief, Cable Services Bureau:

I. INTRODUCTION

1. Here we consider a complaint about the price King Videocable Company ("King") was charging for its cable programming service ("CPS") tier in Amador County, California, CUID No. CA0637. King has attempted to justify its price through a benchmark showing on FCC Form 393. This Order addresses the reasonableness of King's price only through May 14, 1994. At a later time we will issue a separate order addressing the reasonableness of the price after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

II. PROCEDURAL MATTERS

4. The first valid CPS complaint was completed and served on King on December 21, 1993. The Commission received the complaint on December 27, 1993.

5. King attempted to justify its CPS price through an FCC Form 393 filed on January 26, 1994. King amended its justification on June 29, 1994 in response to a Cable Services Bureau Order citing common deficiencies observed in benchmark filings generally,[11] and on January 24, 1995, in response to a Cable Services Bureau Public Notice offering operators the opportunity to make optional supplemental filings.[12]

III. DISCUSSION

6. In its amended benchmark filing of June 29, 1994, King calculated a maximum permitted price for the CPS tier of $6.26 per month. Upon review of King's filing, we have found no apparent errors that would require a recalculation of King's maximum permitted CPS price. However, King's actual price for the CPS tier was $6.27 per month. Thus, King has failed to demonstrate that its price for the CPS tier was not unreasonable.

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[1] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent King has sought to take advantage of the refund deferral period under the *Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking*, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (1994) (*"Second Order on Reconsideration"*), the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which King implemented its CPS price under the new regulations. *See* para. 3, *infra*. Further, to the extent that the price for the period ending May 14, 1994 is found to be excessive, a reduction in King's price for the period after May 14, 1994 may be required to reflect the fact that King's price during the earlier period, which is used as the starting point to calculate its price for the prospective period, was unreasonable. 47 C.F.R. §76.922(b)(4)(c).

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] *Order* in MM Docket No. 92-266, *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[11] *Cable Operators' Rate Justification Filings*, DA 94-526, 9 FCC Rcd 7752 (Cab. Serv. Bur. 1994).

[12] *Public Notice: Cable Services Bureau Announces Optional Procedures with Respect to Pending Pre-May 15 Benchmark Cases*, DA 94-1556 (Dec. 29, 1994); *see also Public Notice: Cable Services Bureau Announces Extension of Time to File Under Optional Procedures Plan with Respect to Pending Pre-May 15 Benchmark Cases*, DA 95-87 (Jan. 20, 1995).

IV. CONCLUSIONS

7. Upon review of the record herein, we conclude that King's showing supports a maximum reasonable CPS tier price of $6.26 per month (plus franchise fee) for the period December 27, 1993 to May 14, 1994.[13] However, we further determine that the refund at issue is such a de minimis amount that it would not serve the public interest to order a refund.

8. We further conclude that King must reflect in its FCC Form 1200 rate filing for the period after May 14, 1994 the fact that King's price during the earlier period was unreasonable.[14] We reserve the right to make further adjustments to King's prices for the period after May 14, 1994 upon completion of our review of King's FCC Form 1200 rate filing.

9. We further conclude that King has submitted in good faith a timely optional supplemental filing in response to our December 29, 1994 Public Notice.[15] As provided in the Public Notice, we will relieve King of its obligation to obtain advance Commission approval of adjustments to its CPS price for one year following the release of this Order.

10. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the December 21, 1993 complaint against the cable programming service price charged by King Videocable Company in Amador County, California, CUID No. CA0637, IS GRANTED TO THE EXTENT INDICATED HEREIN AND DENIED TO THE EXTENT INDICATED HEREIN.

11. IT IS FURTHER ORDERED that the benchmark filing submitted by King Videocable Company with respect to Amador County, California, CUID No. CA0637, for the period of December 27, 1993 to May 14, 1994, justifies a maximum price of $6.26 per month (plus franchise fee) for the cable programming service tier.

12. IT IS FURTHER ORDERED, pursuant to Section 76.922(b)(4)(C) of the Commission's Rules, 47 C.F.R. § 76.922(b)(4)(C), that King Videocable Company shall, within 30 days of the release of this Order, revise its Form 1200 filing with respect to Amador County, California, CUID No. CA0637, for the period beginning May 15, 1994, to reduce the monthly charge per tier as of March 31, 1994 for Tier 2 (Line A6b) to equal the maximum permitted rate (plus franchise fee).

13. IT IS FURTHER ORDERED that King Videocable Company shall place into effect, within 30 days after its submission of the revised Form 1200 filing required above, a CPS tier price that reflects the reduction in the CPS rate determined in this Order.

14. IT IS FURTHER ORDERED, pursuant to Section 76.960 of the Commission's rules, 47 C.F.R. § 76.960, that King Videocable Company shall not be required to obtain advance Commission approval of adjustments to its CPS price for one year following the release of this Order.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Deputy Chief, Cable Services Bureau

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[13] This finding is based solely on the representations of King listed in paragraph 5, *supra*. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

[14] We reviewed King's FCC Form 1200 rate filing and confirmed that King calculated its rates for the period after May 14, 1994 using the rate that we find in this Order to be unreasonable.

[15] *Public Notice: Cable Services Bureau Announces Optional Procedures with Respect to Pending Pre-May 15 Benchmark Cases*, DA 94-1556 (Dec. 29, 1994).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Bresnan Communications Company	CUID Nos. MI0003, MI0006, MI0007, MI0022, MI0024, MI0026, MI0028, MI0061, MI0138, MI0139, MI0140, MI0222, MI0292

Benchmark Filings To Support
Cable Programming Service Prices

MEMORANDUM OPINION AND ORDER

Adopted: February 21, 1995; Released: February 23, 1995

By the Deputy Chief, Cable Services Bureau:

I. INTRODUCTION

1. Here we consider complaints about the prices Bresnan Communications Company ("Bresnan") was charging for its cable programming service ("CPS") tier in the communities designated by the CUID numbers referenced above and on Appendix A. Bresnan has attempted to justify its prices through benchmark showings on FCC Form 393. This Order addresses the reasonableness of Bresnan's prices only through May 14, 1994. At a later time we will issue a separate order addressing the reasonableness of the prices after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

II. PROCEDURAL MATTERS

4. The first complete and timely CPS complaint in each of the franchise areas addressed herein was completed and served on Bresnan and filed with the Commission on the dates set forth on Appendix A.

5. Bresnan attempted to justify its CPS prices through FCC Forms 393 filed on the dates set forth on Appendix B. On February 7, 1995, Bresnan made additional filings in response to a Cable Services Bureau Public Notice offering operators the opportunity to make optional supplemental filings.[11]

III. DISCUSSION

6. Bresnan asserts that its monthly CPS tier prices per subscriber as shown on Appendix C are justified by its benchmark filings because its prices are equal to or below the maximum permitted charges calculated in those filings. Upon review of Bresnan's Forms 393, we have found no apparent errors that would result in Bresnan's CPS tier prices exceeding the maximum permitted prices.

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[1] The findings in this Order do not in any way prejudge the reasonableness of the prices for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Bresnan has sought to take advantage of the refund deferral period under the *Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking*, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (1994) (*"Second Order on Reconsideration"*), the maximum permitted CPS prices determined herein might also apply from May 15, 1994 until the date on which Bresnan implemented its CPS prices under the new regulations. *See* para. 3, *infra*.

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] *Order* in MM Docket No. 92-266, *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[11] *Public Notice: Cable Services Bureau Announces Optional Procedures with Respect to Pending Pre-May 15 Benchmark Cases*, DA 94-1556 (Dec. 29, 1994); *see also Public Notice: Cable Services Bureau Announces Extension of Time to File Under Optional Procedures Plan with Respect to Pending Pre-May 15 Benchmark Cases*, DA 95-87 (Jan. 20, 1995).

IV. CONCLUSIONS

7. Upon review of the record herein, we conclude that Bresnan's showing supports as reasonable its CPS tier prices as shown on Appendix C (plus franchise fee) for the period from the filing of the earliest complaint in each franchise area (as shown on Appendix A) to May 14, 1994.[12]

8. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the complaints referenced on Appendix A against the cable programming service prices charged by Bresnan Communications Company in the franchise areas identified on Appendix A, and all other complaints in these franchise areas relating to the same prices, ARE DENIED TO THE EXTENT INDICATED HEREIN.

9. IT IS FURTHER ORDERED that the benchmark filings submitted by Bresnan Communications Company with respect to the franchise areas set forth on Appendix A for the period from the filing of the earliest complaint in each franchise area (as shown on Appendix A) to May 14, 1994, justify the prices shown on Appendix C (plus franchise fee) for Bresnan Communications Company's cable programming service tier.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Deputy Chief, Cable Services Bureau

Appendix A

CUID No. & Area	Date First Complaint Filed With FCC	Date Complaint Served
MI0003 Ely	11/8/93	11/2/93
MI0006 Marquette	10/15/93	10/7/93
MI0007 Ishpeming	10/5/93	10/4/93
MI0022 Bessemer	10/8/93	10/4/93
MI0024 Escanaba Township	10/12/93	10/5/93
MI0026 Ironwood Town	10/12/93	10/6/93
MI0028 Ironwood City	10/23/93	10/18/93
MI0061 Ontonagon	10/18/93	10/12/93
MI0138 Gladstone City	10/14/93	10/6/93
MI0139 Wells Township	11/4/93	11/2/93
MI0140 Escanaba City	12/12/93	10/7/93
MI0222 Negaunee Township	11/8/93	11/2/93
MI0292 Chocolay	10/26/93	10/20/93

Appendix B

CUID No.	Date First Form 393 Filed with FCC
MI0003	11/29/93
MI0006	11/15/93
MI0007	11/15/93
MI0022	11/15/93
MI0024	11/29/93
MI0026	11/15/93
MI0028	11/15/93
MI0061	11/15/93
MI0138	11/15/93
MI0139	11/15/93
MI0140	11/15/93
MI0222	11/29/93
MI0292	11/15/93

Appendix C

CUID No.	CPS Tier Price
MI0003	$10.47
MI0006	$10.39
MI0007	$10.25
MI0022	$12.26
MI0024	$12.08
MI0026	$12.17
MI0028	$12.32
MI0061	$10.34
MI0138	$12.02
MI0139	$12.14
MI0140	$12.04
MI0222	$10.71
MI0292	$10.45

[12] This finding is based solely on the representations of Bresnan listed in paragraph 5, *supra* , and Appendix B. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TCI Cablevision of Yakima Valley
Sunnyside, Washington

CUID No. WA0226

Order Denying Jurisdiction

MEMORANDUM OPINION AND ORDER

Adopted: February 17, 1995; Released: February 21, 1995

By the Deputy Chief, Cable Services Bureau:

1. In this Order we dismiss a complaint against the price TCI Cablevision of Yakima Valley ("TCI") was charging for its cable programming service ("CPS") tier in Sunnyside, Washington, CUID No. WA0226, on the ground that the complaint concerns rates that are outside the jurisdiction and authority of this Commission. As explained below, the Commission regulates rates for CPS only, and then only upon filing of a valid complaint. Our review reveals that the complaint filed against TCI, while asserting that it challenges CPS rates, challenges only rates for basic service, not for CPS. The complaint therefore does not trigger the Commission's jurisdiction, and it is accordingly dismissed.

2. The Cable Television Consumer Protection and Competition Act of 1992 ("Cable Act of 1992")[1] distinguishes among basic cable service, premium cable service, and cable programming service.[2] The basic service tier is the minimum package of cable service that a consumer can buy. Except in limited circumstances, the Commission does not have jurisdiction over rates for the basic service tier, and cannot act upon complaints concerning rates for that tier. Premium cable service consists of channels that are paid for individually (per-channel) or per-program. By statute, these channels are not subject to rate regulation. CPS includes all video programming that is not on the basic service tier which the operator offers as a package of channels. Rates for CPS tiers are subject to regulation by the Commission in response to a valid complaint.

3. In this case, TCI's rate justification indicates that as of September 1, 1993, it only offered one tier of service in Sunnyside, Washington, CUID No. WA0226. The channel line-ups and rate cards that TCI submitted support this assertion.

4. The complaint under consideration here was filed with the Commission on FCC Form 329. FCC Form 329 is used by subscribers or local franchising authorities wishing to lodge with the Commission a complaint about an operator's CPS rates. The form is entitled "Cable Programming Service Rate Complaint." While the form is designed for use in challenging CPS tier rates, the definition of CPS tier rates is not made clear on the face of the form and it is possible that someone might complete the form without understanding the difference between basic tier rates, premium service rates, and CPS tier rates.[3]

5. We have examined the complaint and TCI's response, and we conclude that the complaint challenges only basic rates, not CPS rates. Although the complainant indicates that the rates challenged violate the Commission's rules, the specific information provided by the complainant indicates that only basic rates are at issue. When only basic rates are being challenged, the complaint should properly be brought to the attention of the local franchising authority in the first instance, and not filed with this Commission. If the complaint does in fact challenge CPS rates, the complainant may file a petition for reconsideration providing information adequate to support his challenge.

6. Accordingly, IT IS ORDERED, pursuant to Section 623(a)(2)(A) and (B) of the Communications Act of 1934, as amended, 47 U.S.C. §543(a)(2)(A) and (B), that the complaint filed prior to May 14, 1994, against the cable programming service price charged by TCI Cablevision of Yakima Valley, in Sunnyside, Washington, CUID No. WA0226, IS DISMISSED.

7. This action is taken pursuant to delegated authority under Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Deputy Chief, Cable Services Bureau

[1] Cable Television Consumer Protection and Competition Act, Pub. L. No. 102-385, 106 Stat. 1460 (1992) (Cable Act of 1992).
[2] Cable Act of 1992, Section 602, 47 U.S.C. § 522.
[3] We note that operators have great latitude in determining what channels will be included in the basic tier; once the statutory minimum (broadcast and public educational and governmental access channels) is met, the operator may include as many additional channels in the basic tier as it wants, or it may move additional channels to a higher tier. Thus it is possible that a complainant might not clearly understand which channels are part of which tier.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

NewChannels Corporation Potsdam, New York	CUID Nos. NY0022, NY0023, NY0036, NY0037, NY0038, NY0099, NY0100, NY0101, NY0544, NY0725, NY0756, NY0813, NY0886, NY1529, NY1530, NY1620, NY1621, NY1623 and NY1625

Benchmark Filing To Support
Cable Programming Service Price

MEMORANDUM OPINION AND ORDER

Adopted: February 16, 1995; Released: February 21, 1995

By the Deputy Chief, Cable Services Bureau:

I. INTRODUCTION

1. Here we consider complaints about the price NewChannels Corporation ("NewChannels") was charging for its cable programming service ("CPS") tier in CUID Nos. NY0022, NY0023, NY0036, NY0037, NY0038, NY0099, NY0100, NY0101, NY0544, NY0725, NY0756, NY0813, NY0886, NY1529, NY1530, NY1620, NY1621, NY1623 and NY1625. NewChannels has chosen to attempt to justify its price through a benchmark showing on FCC Form 393. This Order addresses the reasonableness of NewChannels's price only through May 14, 1994. At a later date we will issue a separate order addressing the reasonableness of the price after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

II. PROCEDURAL MATTERS

4. The first CPS complaint was completed and served onP NewChannels on December 22, 1993.[11] The Commission received the complaint on December 27, 1993.

5. NewChannels attempted to justify its CPS price through FCC Form 393's filed on February 14, 1994 for CUID Nos. NY0022, NY0023, NY0036, NY0037, NY0038, NY0099, NY0100, NY0101, NY0725, NY0886, NY1530, NY1620, NY1621 and NY1625; February 15, 1994 for CUID Nos. NY0544, NY0756 and NY1529; and February 18, 1994 for CUID No. NY1623. NewChannels amended its justifications on July 5, 1994, in response to a Cable Services Bureau Order citing common deficiencies observed in benchmark filings generally.[12]

III. DISCUSSION

6. NewChannels asserts that its monthly CPS tier price of $10.56 per subscriber is justified by its benchmark filing because its price is equal to the maximum permitted charge of $10.56 as calculated in the filing. Upon review of NewChannels's Form 393, we have found no apparent errors that would require a recalculation of NewChannels's maximum permitted CPS price.

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[1] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent NewChannels has sought to take advantage of the refund deferral period under the *Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking*, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (*"Second Order on Reconsideration"*), the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which NewChannels implemented its CPS price under the new regulations. *See* para. 3, *infra*.

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] *Order* in MM Docket No. 92-266, *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] *Second Order on Reconsideration;* 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration* at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration* at 4189 n.195.

[11] The complaint was dated December 22, 1993 and states that it was mailed to NewChannels on that date. NewChannels has not complied with 47 C.F.R. § 76.956(a), which requires it to state when service occurred. Under these circumstances we will consider December 22, 1993 as the service date.

[12] *Cable Operators' Rate Justification Filings*, DA 94-526, 9 FCC Rcd 7752 (Cab. Serv. Bur. 1994).

IV. CONCLUSIONS

7. Upon review of the record herein, we conclude that NewChannels has demonstrated that $10.56 per month (plus franchise fee) was the maximum reasonable CPS tier price for the period December 27, 1993, to May 14, 1994.[13]

8. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the December 22, 1993 complaint against the cable programming service price charged by NewChannels Corporation in Potsdam, New York, CUID Nos. NY0022, NY0023, NY0036, NY0037, NY0038, NY0099, NY0100, NY0101, NY0544, NY0725, NY0756, NY0813, NY0886, NY1529, NY1530, NY1620, NY1621, NY1623 and NY1625, and all other complaints relating to the same price, ARE DENIED TO THE EXTENT INDICATED HEREIN.

9. IT IS FURTHER ORDERED that the benchmark filing submitted by NewChannels Corporation in Potsdam, New York with respect to CUID Nos. NY0022, NY0023, NY0036, NY0037, NY0038, NY0099, NY0100, NY0101, NY0544, NY0725, NY0756, NY0813, NY0886, NY1529, NY1530, NY1620, NY1621, NY1623 and NY1625 for the period of December 27, 1993 to May 14, 1994, justifies a maximum price of $10.56 per month (plus franchise fee) for NewChannels Corporation's cable programming service tier.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Deputy Chief, Cable Services Bureau

[13] This finding is based solely on the representations of NewChannels listed in paragraph 5, *supra*. Should information come to our attention that these representations (including representations as to data regarding installations and customer equipment) were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

NewChannels Corporation Canonsburg, Pennsylvania	CUID Nos. PA0064, PA0066, PA0067, PA0689, PA0799, PA3039, PA3040 and PA3133

Benchmark Filing To Support
Cable Programming Service Price

MEMORANDUM OPINION AND ORDER

Adopted: February 16, 1995; Released: February 21, 1995

By the Deputy Chief, Cable Services Bureau:

I. INTRODUCTION

1. Here we consider complaints about the price NewChannels Corporation ("NewChannels") was charging for its cable programming service ("CPS") tier in CUID Nos. PA0064, PA0066, PA0067, PA0689, PA0799, PA3039, PA3040 and PA3133. NewChannels has chosen to attempt to justify its price through a benchmark showing on FCC Form 393. This Order addresses the reasonableness of NewChannels's price only through May 14, 1994. At a later date we will issue a separate order addressing the reasonableness of the price after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

II. PROCEDURAL MATTERS

4. The first CPS complaint was completed and served on NewChannels on December 23, 1993.[11] The Commission received the complaint on December 30, 1993.

5. NewChannels attempted to justify its CPS price through FCC Form 393's filed on February 14, 1994 for CUID Nos. PA0064, PA0066, PA0689, PA0799, PA3039 and PA3040; February 15, 1994 for CUID No. PA3133; and February 18, 1994 for CUID No. PA0067. NewChannels amended its justification on July 5, 1994, in response to a Cable Services Bureau Order citing common deficiencies observed in benchmark filings generally.[12]

III. DISCUSSION

6. NewChannels asserts that its monthly CPS tier price of $11.39 per subscriber is justified by its benchmark filing because its price is equal to the maximum permitted charge of $11.39 as calculated in the filing. Upon review of NewChannels's Form 393, we have found no apparent errors that would require a recalculation of NewChannels's maximum permitted CPS price.

IV. CONCLUSIONS

7. Upon review of the record herein, we conclude that NewChannels has demonstrated that $11.39 per month (plus franchise fee) was the maximum reasonable CPS tier price for the period December 30, 1993 to May 14, 1994.[13]

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[1] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent NewChannels has sought to take advantage of the refund deferral period under the *Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking*, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (*"Second Order on Reconsideration"*), the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which NewChannels implemented its CPS price under the new regulations. *See* para. 3, *infra*.

[2] Pub. L. No. 102-385; 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] *Order* in MM Docket No. 92-266, *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] *See Second Order on Reconsideration;* 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration* at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration* at 4189 n.195.

[11] The complaint was dated December 23, 1993 and states that it was mailed to NewChannels on December 23, 1993. NewChannels has not complied with 47 C.F.R. § 76.956(a), which requires it to state when service occurred. Under these circumstances we will consider December 23, 1993 as the service date.

[12] *Cable Operators' Rate Justification Filings*, DA 94-526, 9 FCC Rcd 7752 (Cab. Serv. Bur. 1994).

[13] This finding is based solely on the representations of NewChannels listed in paragraph 5, *supra*. Should information come to our attention that these representations (including

8. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the December 23, 1993 complaint against the cable programming service price charged by NewChannels Corporation in Canonsburg, Pennsylvania, CUID Nos. PA0057, PA0066, PA0067, PA0689, PA0799, PA3039, PA3040 and PA3133, and all other complaints relating to the same price, ARE DENIED TO THE EXTENT INDICATED HEREIN.

9. IT IS FURTHER ORDERED that the benchmark filing submitted by NewChannels Corporation with respect to Canonsburg, Pennsylvania, CUID Nos. PA0064, PA0066, PA0067, PA0689, PA0799, PA3039, PA3040 and PA3133, for the period of December 30, 1993 to May 14, 1994, justifies a maximum price of $11.39 per month (plus franchise fee) for NewChannels Corporation's cable programming service tier.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Deputy Chief, Cable Services Bureau

representations as to data regarding installations and customer equipment) were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

ML MEDIA PARTNERS, L.P.
TRADING AS MULTIVISION CABLE TV

Appeal of Local
Rate Order of City of
Villa Park, California

ORDER

Adopted: February 16, 1995; Released: February 17, 1995

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. On September 22, 1994, ML Media Partners, L.P., trading as Multivision Cable TV ("Multivision") filed with the Commission an Appeal From a Rate Order of the City of Villa Park, California ("Appeal").[1] In Resolution No. 94-2201, adopted August 23, 1994 (the "local order"), the City of Villa Park, California ("the City") established Multivision's rates for basic cable service, equipment, installations and hourly service charges.[2] As part of this decision setting the basic tier rates, the City found that the channels contained in Multivision's "Super Cable" package must be included as regulated channels.[3] Further, in reaching its decision, pursuant to the Commission's "benchmark" approach for reviewing cable rates, the City was required to consider the number of regulated satellite channels offered by Multivision. The City ordered Multivision to make refunds or to credit subscribers for all payments made in excess of the rates for basic service and equipment and installations set forth in the local order for the period September 1, 1993 through July 15, 1994.[4]

2. In its appeal, Multivision challenges the local order on two grounds. First, Multivision argues that the City's decision to treat the channels in the a la carte package as regulated channels is contrary to the objectives of the 1992 Cable Act and the Commission's a la carte rules. Second, Multivision alleges that the City miscalculated the benchmark channel rate by using an incorrect satellite channel count for September 30, 1992. The City responds that it properly applied the Commission's guidelines on a la carte packages and concluded that the channels in Multivision's package should be treated as regulated channels and that it properly relied upon information supplied by Multivision in determining the number of satellite channels.

3. Under our rules, rate orders made by local franchising authorities may be appealed to the Commission.[5] In ruling on appeals of local rate orders, the Commission will not conduct a *de novo* review, but instead will sustain the franchising authority's decision as long as there is a reasonable basis for that decision.[6] Therefore, the Commission will reverse a franchising authority's decision only if it determines that the franchising authority acted unreasonably in applying the Commission's rules in rendering its local rate order.[7] If the Commission reverses a franchising authority's decision, it will not substitute its own decision but instead will remand the issue to the franchising authority with instructions to resolve thecase consistent with the Commission's decision on appeal.[8] With respect to a determination made by a franchising authority on the regulatory status of an a la carte package as part of its final decision setting rates for the basic service tier, the Commission has stated that "the Commission will defer to the local authority's findings of fact if there is a reasonable basis for the local findings," and the Commission "will then apply FCC rules and precedent to those facts to determine the appropriate regulatory status of the [a la carte package] in question."[9]

II. DISCUSSION

A. A LA CARTE

4. Multivision objects to the City's finding in the local order that the channels comprising Multivision's Super Cable a la carte package must be included as regulated channels. Multivision argues that its a la carte package

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[1] Other filings in this proceeding include an Opposition of the City of Villa Park, California to Appeal from an Order to Prescribe and Refund Rates for the Basic Service Tier and Related Service Charges filed by the City on October 3, 1994, and a Reply to Opposition to Appeal from a Rate Order of the City of Villa Park, California filed by Multivision on October 14, 1994.

[2] *See* Appeal, Exhibit F, A Resolution of the City Council of the City of Villa Park, Pursuant to Sections 76.936, 76.941 and 76.942 of the Rules and Regulations of the Federal Communications Commission Disapproving Certain Cable Television Rates and Charges for the Basic Service Tier, in Part, and Ordering Refunds.

[3] The Super Cable channels are offered in the Super Cable package or on an individual ("a la carte") basis.

[4] Under the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act"), Pub. L. No. 102-385, 106 Stat. 1460 (1992), Communications Act of 1934, § 623(b), 47 U.S.C. § 543(b), and the Commission's implementing regulations, local franchising authorities may regulate rates for basic cable service and associated equipment.

[5] 47 C.F.R. § 76.944.

[6] *See* Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, Report and Order, MM Docket 92-266, 8 FCC Rcd 5631, 5731 (*"Rate Order"*); and Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, Buy-Through Prohibition, Third Order on Reconsideration, MM Docket 92-266, 9 FCC Rcd 4316, 4346 (1994) (*"Third Reconsideration Order"*).

[7] *Id.*

[8] *Rate Order*, 8 FCC Rcd at 5732; *Third Reconsideration Order*, 9 FCC Rcd at 4346.

[9] Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, Second Order on Reconsideration, Fourth Report and Order, MM Docket No. 92-266, 9 FCC Rcd 4119, 4217 (1994) (*"Second Reconsideration Order"*).

complies with the Commission's a la carte rules in effect at the time the package was created[10] and that the City's reliance upon the 15 interpretive guidelines announced by the Commission in March 1994 to determine the regulatory status of Multivision's a la carte channels constituted "retroactive rulemaking."[11]

5. The Multivision Super Cable package at issue was first offered to subscribers on September 1, 1993, when Multivision restructured the service offerings on its Villa Park system. Multivision states that its September 1, 1993 restructuring involved eliminating its 24 channel cable programming service tier and offering five channels (two from its former cable programming service tier (The Discovery Channel and Turner Network Television), two from its basic service tier (WTBS and WGN), and one new channel (ESPN2)) on an individual basis and also as the Super Cable package that Multivision alleges is not subject to rate regulation.

6. The facts presented in this appeal are similar to the facts presented in two of our recently issued letter of inquiry orders on a la carte packages, *Century Cable TV*, Brunswick, Georgia, LOI-93-44, LOI-94-4, DA 94-1426 (Cab. Serv. Bur., released Dec. 12, 1994) and *Falcon Cable TV*, Port Orchard, Washington, LOI-93-50 DA 94-1548 (Cab. Serv. Bur., released Dec. 22, 1994), in which we resolved the regulatory status of a la carte packages similar to the a la carte package at issue in this appeal. Specifically, the a la carte packages at issue in the *Century Cable TV* and *Falcon Cable TV* orders were six channel packages that were offered as part of a restructuring that also involved the elimination of all cable programming services tiers, whereas Multivision's a la carte package at issue here is a five channel package offered as part of a restructuring that involved the elimination of Multivision's only cable programming service tier. In the *Century Cable TV* and *Falcon Cable TV* cases, we found we could not say that it was clear that the a la carte packages at issue were not permissible non-rate regulated offerings under our rules. We further concluded that in light of the prior confusion over what constituted a permissible non-rate regulated a la carte offering, it would be inequitable to subject the operators to refund liability or to require the operators to restructure their tiers so as to return the channels offered in the a la carte packages to regulated tiers. Instead, we found that the a la carte packages at issue may be treated as new product tiers under the Commission's *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, Sixth Order on Reconsideration, Fifth Report and Order*, MM Docket Nos. 92-266 and 93-215, FCC 94-286 (released November 18, 1994) (*"Going Forward Order"*).[12]

7. We find that the City's determination that Multivision's a la carte package is a regulated tier is inconsistent with the action taken in the letter of inquiry orders, and in particular, in *Century Cable TV* and *Falcon Cable TV*. We further find that, in accordance with *Century Cable TV* and *Falcon Cable TV*, Multivision's a la carte package should not be treated as a rate-regulated tier of service. Accordingly, we are remanding this issue to the City so that it can enter an order consistent with our findings in *Century Cable TV* and *Falcon Cable TV*.[13]

B. SATELLITE CHANNEL COUNT

8. Multivision further argues that the City, pursuant to the Commission's benchmark approach for reviewing cable rates, miscalculated the number of satellite channels offered by Multivision on September 30, 1992 and reported on FCC Form 393. Form 393 is the official form used by regulators to determine whether an operator's regulated rates for programming, equipment and installations were reasonable during the time period from September 1, 1993 until May 14, 1994.[14] Form 393 is divided into three separate, but interrelated parts. In Part II, the operator calculates its maximum permitted programming rates, while in Part III, the operator calculates its maximum permitted equipment and installation rates. Part I is a cover sheet that lists the various programming, equipment and installation rates that have been calculated in Parts II and III and compares them to the rates the operator has actually charged during the period of review.

9. The operator's maximum permitted rates are derived by completing Parts II and III of the Form 393, pursuant to which the operator calculates the actual aggregate revenues collected by the operator for regulated programming, equipment and installation, as of the initial date of regulation ("current rate") or as of September 30, 1992.[15] After calculating actual aggregate revenues, the operator converts those revenues to a per-channel rate, and then compares the per-channel figures to the applicable benchmark rate. If an operator's current per-channel rate is below the ap-

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[10] *See Rate Order*, 8 FCC Rcd at 5836-5838.

[11] Appeal at 19. In the *Second Reconsideration Order*, the Commission set out 15 guidelines "that local authorities and the Commission should consider in assessing in an individual case whether an 'a la carte' package enhances consumer choice and does not constitute an evasion of rate regulation." *Second Reconsideration Order*, 9 FCC Rcd at 4214.

[12] New product tiers are cable programming services that, subject to certain conditions, are not rate regulated. *Going Forward Order* at ¶ ¶ 16-37. In the *Going Forward Order*, the Commission reconsidered its regulatory treatment of collective offerings of a la carte channels. Specifically, the Commission determined that such packages are cable programming service tiers within the meaning of Section 3(1)(2) of the 1992 Cable Act and therefore will be subject to our general rate regulation rules. *Id.* at ¶ 51. However, the Commission also stated that with respect to packages created between April 1, 1993 and September 30, 1994, where it is not clear that a particular package was not a permissible offering under the a la carte rules in effect at the time it was created, the package may be treated as a new product tier. *Id.*

[13] We need not address Multivision's argument with respect to the "retroactive" application by the City of the 15 guidelines set forth in the *Second Reconsideration Order*, in light of the fact that we grant Multivision's appeal on the a la carte issue and remand this case to the City.

[14] To the extent that an operator has sought to take advantage of the refund deferral period available under the *Second Reconsideration Order*, the maximum permitted rates determined under Form 393 may also apply from May 15, 1994 until the date that the operator implemented its new rates, as determined under the Form 1200 series. *Second Reconsideration Order*, 9 FCC Rcd at 4183-4185.

[15] An operator must calculate its rate in effect on September 30, 1992, only if its current rate is above the benchmark rate. If an operator's current rate is at or below the benchmark rate, it is not required to calculate its September 30, 1992 per-channel rate.

plicable benchmark rate, then the operator's rate is deemed reasonable, but it must remain at itscurrent level. If its current per-channel rate exceeds the benchmark rate, the operator must then compare its September 30, 1992 per-channel rate to the applicable benchmark rate. If its September 30, 1992 per-channel rate is above the benchmark rate, it must reduce this rate to the benchmark rate or by 10%, whichever reduction is less. The adjusted rate will be its maximum permitted rate for programming.

10. Multivision argues that the City miscalculated Multivision's September 30, 1992 per-channel rate by using an incorrect satellite channel count on Line 220 of Form 393. In particular, Multivision argues that the City incorrectly identified two channels as satellite-delivered services on September 30, 1992, when the programming carried on one channel was a locally produced service and the other channel carried a local off-air broadcast station. The City responds that its satellite channel count is reasonable because it is based upon information provided by Multivision and because the City's count was available to Multivision without any claim of protest or error since January, 1994.

11. While the Commission will sustain the decisions of franchising authorities if there is a reasonable basis for doing so, we expect franchising authorities to adhere to the mathematical principles underlying the benchmark methodology. In this case, the City must properly count the number of satellite channels in order to establish Multivision's September 30, 1992 per-channel rate. In addition, because the City in its local order prescribes a rate different than the rate proposed by Multivision, the City must affirmatively demonstrate why Multivision's proposed rate is unreasonable.[16] The City does not contend that its channel count was correct, nor has it offered any evidence that the two channels which Multivision contends were not satellite channels as of September 30, 1992, were in fact satellite channels. Accordingly, we conclude that the City's satellite channel count is unreasonable and we remand that portion of the local order to the City for further proceedings consistent with this ruling.

III. ORDERING CLAUSES

12. Accordingly, IT IS ORDERED that the appeal of the local order, with respect to the issue of the regulatory status of Multivision's a la carte package, is REMANDED to the City for resolution in accordance with the terms of this Order.

13. IT IS FURTHER ORDERED that the appeal of the local order, with respect to the satellite channel count, is REMANDED to the City for resolution in accordance with the terms of this Order.

14. This action is taken by the Chief, Cable Services Bureau, pursuant to authority delegated by section 0.321 of the Commission's rules. 47 C.F.R. § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

[16] *Rate Order*, 8 FCC Rcd at 5723.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

MASADA CABLE PARTNERS II, L.P.

Appeal of Local
Rate Order of City of
Gaffney, South Carolina

ORDER

Adopted: February 16, 1995; Released: February 21, 1995

By the Chief, Cable Services Bureau:

I. BACKGROUND

1. Masada Cable Partners II, L.P. ("Masada"), the franchisee in the above matter, filed with the Commission on July 18, 1994 an Appeal of [a] Local Rate Order adopted by its franchising authority, the City of Gaffney, South Carolina (the "City"), on June 16, 1994.[1] The local rate order establishes a new regulated rate schedule for Masada's basic service tier rates and associated equipment and installations.[2] The order requires Masada to implement certain rate reductions and to issue refunds to subscribers, dating back to September 1, 1993.

2. On November 15, 1993, the City of Gaffney filed for certification with the Commission to regulate rates for cable television service and adopted regulations in accordance with the Commission's rules.[3] Masada filed its original Form 393[4] with the City on December 10, 1993, within the 30-day time limit prescribed by the Commission's rules.[5] Subsequently, upon its own initiative, Masada filed a revised version of its Form 393 with the City on January 11, 1994. Along with this second filing, Masada included a "Statement From Director of Operations," a nine-page document that appears to be an explanation of the general theory underlying Form 393 and of Masada's completion of the form. On January 17, 1994, the City notified Masada that it was releasing an order tolling the deadline for issuing its rate decision and extending its review period, as allowed under the Commission's rules.[6] On June 16, 1994, the City issued its rate order, setting Masada's rates for basic tier service and associated equipment and installations, based upon the data contained in Masada's original Form 393 filing. In issuing its order, the City rejected the information in Masada's revised Form 393 as both untimely and defective.

3. In its appeal, Masada challenges the City's rejection of the revised Form 393, and disputes the rates that the City approved for Masada's regulated services. According to Masada, these rates were based on incomplete and inaccurate data contained in its original Form 393. As a basis for its appeal, Masada asserts that the City had a duty to consider and review Masada's revised Form 393 and that the revised filing should not have been barred from review due to untimeliness. Masada also disputes the City's determination that the revised Form 393 was defective. Specifically, Masada challenges the City's determination with regard to the following issues: (1) that Masada attempted in its revised Form 393 to justify programming rates that were in effect prior to the initial date of regulation; (2) that Masada did not use the correct number of subscribers in Line 103 of Worksheet 1 and Line 203 of Worksheet 2 on the revised Form 393; and (3) that Masada used an incorrect inflation factor as derived by Lines 122-127 of Worksheet 1 in the revised Form 393. Masada asserts that its revised Form 393 should have been considered by the City in rendering its rate order, and that the rates derived by the revised form should have been the rates adopted by the City as Masada's reasonable rates for service.

4. In response, the City claims that it was under no legal obligation to consider any revised filings from Masada and, consequently, was justified in basing its rate determination on Masada's original Form 393, which was filed within the requisite time period, as provided for under the Commission's rules.[7] The City claims that because Masada filed the original Form 393 in a timely fashion, Masada had the responsibility to explain to the City why this filing was no longer accurate and should be superseded by the revised filing. Because Masada did not do so, the City adopted the rates derived by the original Form 393 and claims that those rates are reasonable. In the alternative, the City also argues that the revised Form 393 was defective. The City

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[1] Along with its Appeal of Local Rate Order, Masada also filed a Request for Emergency Stay of Local Cable Rate Order on July 18, 1994. The City of Gaffney filed oppositions to both the appeal and request for stay. Masada filed a reply to the City's opposition to the appeal on August 17, 1994. Because we are resolving this dispute on the merits presented in the appeal, the petition for stay has been rendered moot.

[2] Under the Cable Television Consumer Protection and Competition Act of 1992 and the Commission's implementing regulations, local franchising authorities may regulate rates for basic cable service and associated equipment. *See* Cable Television Consumer Protection and Competition Act, Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(b), 47 U.S.C. § 543(b).

[3] Local franchising authorities must certify to the Commission, using FCC Form 328, that they are legally authorized and are actually able to regulate cable rates. Unless the Commission notifies the franchising authority otherwise, the certification becomes effective 30 days after the date Form 328 is filed. As part of this certification process, local franchising authorities must adopt regulations consistent with those rules adopted by the Commission to determine reasonable rates, provide a reasonable opportunity for consideration of the views of interested parties within 120 days of the effective date of certification, and notify the cable operator that the certification has been filed. *See* 47 C.F.R. § 76.910.

[4] FCC Form 393 is the official form used by cable operators to determine whether their regulated rates for programming, equipment and installations were reasonable for the period beginning September 1, 1993 and ending May 15, 1994.

[5] *See* 47 C.F.R. § 76.930.

[6] *See* 47 C.F.R. § 76.933.

[7] "A cable operator shall file its schedule of rates for the basic service tier and associated equipment with a franchising authority within 30 days of receiving notification from the franchising authority that the franchising authority has been certified by the Commission to regulate rates for the basic service tier." 47 C.F.R. § 76.930.

asserts that the revised Form 393 contained inaccurate data and therefore could not be relied upon to establish Masada's reasonable rates for service.

II. DISCUSSION

5. Under our rules, rate orders made by local franchising authorities may be appealed to the Commission.[8] In ruling on appeals of local rate orders, the Commission will not conduct a *de novo* review, but instead will sustain the franchising authority's decision as long as there is a reasonable basis for that decision.[9] The Commission will reverse a franchising authority's decision only if it determines that the franchising authority acted unreasonably in applying the Commission's rules in rendering its local rate order.[10] If the Commission reverses a franchising authority's decision, it will not substitute its own decision but instead will remand the issue to the franchising authority with instructions to resolve the case consistent with the Commission's decision on appeal.[11]

6. In this case, the City reviewed Masada's second, albeit unsolicited, filing, and rejected it on two alternative bases. First, the City determined that the revised filing was not submitted to the City within the 30-day deadline required under the Commission's rules for the filing of rate justifications and, therefore, the City had no obligation to consider the revised filing.[12] Second, the City found that the revised form was defective in several respects and, therefore, did not merit consideration. We find that the City's actions were reasonable.

A. Rejection of Masada's Revised Form 393 As Untimely

7. In this proceeding, we must determine whether the City's rejection of Masada's revised Form 393 as untimely was reasonable. If a franchising authority elects to toll the deadline for review of a cable operator's rate filing, as the City did here, we have stated that the solicitation and collection of additional information during the review period will be at the franchising authority's discretion.[13] However, our rules also provide that, where the franchising authority is unable to rule on the reasonableness of the proposed rate, the tolling order should provide the cable operator an opportunity to cure any deficiencies in its original filing.[14] Under such circumstances, a local franchising authority should accept for review amended or supplemental filings to an original Form 393 if an operator submits the new information within a reasonable period of time and presents an adequate explanation or justification for its necessity.[15]

8. A cable operator bears the burden of justifying its rates as reflected in FCC Form 393. Therefore, Masada had the responsibility to explain and to justify the information contained in its original FCC Form 393 and any subsequent modifications to the original filing.[16] When Masada refiled, it did not attempt to explain why its modifications were necessary or why they had not been included in the previous filing. Even though Masada had ample opportunity to ensure that the City was aware of the rationale behind its revised submission, Masada chose not to offer any explanation for the modifications it made. Although Masada did include a "Statement from its Director of Operations" with its revised filing, this statement attempted to explain in the abstract the general theory of the Form 393; it did not explain any of the specific changes that Masada made in the revised filing. This statement did not constitute an adequate explanation or justification so as to compel the City to consider Masada's revised filing. Therefore, it was reasonable for the City not to consider Masada's revised FCC Form 393.

B. The City's Finding Regarding Masada's Revised Programming Rates

9. We also agree with the City that Masada's revised Form 393 was defective in several key substantive respects. The first of these substantive flaws involves the programming rate Masada used in its revised filing. Masada's revised Form 393 did not reflect Masada's then current programming rates on Line 101 of Worksheet 1 or on the Part I Cover Sheet as the instructions to the form require. Instead, Masada attempted to justify programming rates that were in effect prior to the initial date of regulation.[17] Worksheet 1 of Form 393 clearly asks for the rates in effect on the initial date of regulation.[18] Form 393 is not used to

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[8] *See* 47 C.F.R. § 76.944.

[9] *See* Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, Report and Order and Further Notice of Proposed Rulemaking, MM Docket 92-266, 8 FCC Rcd 5631, 5731 (1993)("*Rate Order*"); Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, Buy-Through Prohibition, Third Order on Reconsideration, MM Docket 92-266, 9 FCC Rcd 4316, 4344 (1994)("*Third Reconsideration Order*").

[10] *Id.*

[11] *Id.*

[12] *See* 47 C.F.R. § 76.930.

[13] *Rate Order* at 5709 ("To toll the effective date of the proposed rates, the franchising authority must issue a brief order, within the initial 30-day period, explaining that the franchising authority needs additional time to review the proposed rates. During these 90 or 150-day periods, the franchising authority *can* solicit additional information from the cable operator, if necessary, and consider the views of interested parties." (emphasis added))

[14] *See* 47 C.F.R. § 76.933(b); *Rate Order* at 5709, n.311 ("If the franchising authority is unable to determine whether the proposed rate complies with the Commission's reasonable rate standard, then the order tolling the effective date of the proposed rate should explain why the franchising authority could not make such a determination. The order should also provide the cable operator an opportunity to cure any deficiencies in itsh) original filing.").

[15] *See* 47 C.F.R. § 76.933(b); *Rate Order* at 5709, n.311.

[16] *See* 47 C.F.R. § 76.937; *Rate Order* at 5716 ("We believe that the burden of proof should be on the cable operator to demonstrate that its initial rates for the basic service tier and accompanying equipment, or proposed increases in these rates, comply with Section 623 [of the 1992 Cable Act] and our implementing regulations. This will expedite decision-making, as the operator possesses the factual information necessary for such a demonstration.").

[17] Because the City of Gaffney certified to regulate rates on November 15, 1993, the rates in effect on that date should have been used to determine Masada's reasonable rates for regulated service. These rates were correctly used in Masada's original Form 393. The revised Form 393 used rates in effect in June of 1993 that differed from the rates that were in effect on November 15, 1993.

[18] *See Public Notice*, Questions and Answers on Completion of FCC Form 393 and Associated Filing Requirements, Question

justify rates offered to subscribers prior to the initial date of regulation.[19] The Commission's rules and the instructions to Form 393 do not ask a cable operator to justify such rates nor does Form 393 contemplate their use in deriving an operator's reasonable permitted rates.[20] There was thus no reason for the City to consider Masada's revised FCC Form 393 which attempted to justify rates charged at a date prior to the initial date of regulation.

C. The City's Finding Regarding Masada's Revised Bulk Subscriber Count

10. We also find reasonable the City's finding that Masada's revised subscriber count information was defective. Masada claims that it counted its bulk subscribers as full subscribers on Lines 103 and 203 of its original Form 393, rather than as Equivalent Billing Units ("EBUs").[21] Masada claims in its filings in this record that its revised Form 393 corrects this error and that the effect is a lower overall subscriber count, but a higher maximum permitted rate for the basic service tier. However, Masada made no attempt at the time it made its revised filing to explain to the City the difference between the new subscriber numbers listed in the revised Form 393 and the subscriber numbers listed in its original Form 393. Furthermore, Masada did not explain the derivation or the source of these new subscriber numbers. Finally, the guidance made available by the Commission in a *Public Notice* regarding the treatment of EBUs was available to Masada long before Masada filed its original Form 393.[22] In fact, this *Public Notice* was released by the Commission in July of 1993, five months before Masada filed its original Form 393.[23] The City was under no obligation to accept the new numbers presented in Masada's revised filing without any type of explanation or justification of these numbers from Masada. Masada was ultimately responsible for the treatment and inclusion of EBUs in its original filing. Although Masada defined the term "EBUs" in its "Statement from Director of Operations" filed along with its revised Form 393, it did not indicate that this definition was the reason for its new subscriber numbers to the City. Without an adequate explanation for why the subscriber numbers were different in the revised Form 393 from the numbers in the original Form 393, the City was justified in relying upon Masada's original filing.

D. The City's Finding Regarding Masada's Revised Inflation Adjustment

11. In its rate order, the City held that in the revised Form 393 Masada used an incorrect number of months in determining the adjustment time period (Line 124) and the GNP-PI time period (Line 125), and that Masada used the incorrect inflation factor in Line 123. Masada claims that the data used to calculate the inflation factor in the revised Form 393 is correct and should have been accepted by the City. We agree with the City.

12. With respect to the adjustment time period and the GNP-PI time period calculations, in its revised filing Masada changed the information on Lines 122 to 125 to conform to the date of Masada's revised filing, rather than the date of the original filing. This is not permissible under our rules. An operator may only account for inflation up until the operator's original Form 393 filing date.[24] Even if a franchising authority allowed a cable operator to submit a revised Form 393 to correct errors in an original submission, the operator is still required to use inflation data from the period corresponding to the original filing date, not the filing date of the revised form.[25] A cable operator is not allowed to continuously recalculate the inflation adjustment over longer time periods in revised Form 393 filings and resubmit those new calculations during the franchising authority's review period. Thus, the City correctly held that Masada's revised Form 393 utilized the incorrect inflation adjustment and GNP-PI time periods on Lines 124 and 125.

13. With respect to the calculation of the inflation factor on Line 123, Masada claims that it could reasonably rely upon the third quarter 1992 GNP-PI inflation estimate as printed on Line 123 of Worksheet 1 of Form 393 (121.8), and that it was not required to adjust this figure to reflect updates or revisions made to that estimate by the Department of Commerce subsequent to the printing of Form 393. Generally, an operator should use for inflation adjust-

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No. 6 (November 10, 1993) ("FCC Form 393 measures and compares to the benchmark the rates in effect on the initial date of regulation.").

[19] "Section 76.922(b) of the Commission's rules provides that the permitted per channel rate shall be determined as of the initial date of regulation. FCC Form 393 measures and compares to the benchmark the rates in effect on the initial date of regulation. Information on which FCC Form 393 calculations are based therefore should be current to the greatest extent possible as of the initial date of regulation where current information (or information as of the initial date of regulation) is called for in that form and associated instructions. In Worksheet 1 to FCC Form 393, concerning channels offered, for example, operators should use the number of channels as of the initial date of regulation instead of channels offered on a different date. Operators that have chosen to add or delete channels as of September 1, 1993 as part of service restructurings, or as part of subsequent restructurings, in anticipation of rate regulation should use the number of channels as of the initial date of regulation instead of the channels offered on September 1, 1993. Similarly, operators should refresh cost and other financial information as of the initial date of regulation based on the most recent information available." *Public Notice*, Questions and Answers on Completion of FCC Form 393 and Associated Filing Requirements, Question No. 6 (November 10, 1993).

[20] *See Public Notice*, Questions and Answers on Completion of FCC Form 393 and Associated Filing Requirements, Question No. 6 (November 10, 1993).

[21] "The number of subscribers should be attributed to bulk accounts as if they paid the regular subscriber rate. Thus, for example, if the tier of service costs $10 and a 200-unit apartment building is billed $500, then the operator would add to the number of regular subscribers included in Line 103 ($500$10 = 50 subscribers)." *Public Notice*, Questions and Answers Relating to FCC Form 393, Question No. 5 (July 30, 1993).

[22] *See Public Notice*, Questions and Answers Relating to FCC Form 393, Question No. 5 (July 30, 1993).

[23] *Id.*

[24] A cable operator has 30 days in which to file a Form 393 upon notification of a franchising authority's certification to regulate rates.

[25] *See* 47 C.F.R. § 76.922(b)(7) ("For purposes of this section, the initial date of regulation for the basic service tier shall be the date on which local notice is given pursuant to § 76.910 of our rules, that the provision of the basic service tier is subject to regulation.").

ment calculations the most recent, publicly available data applicable to the period in which the operator must file its Form 393.[26] In a *Public Notice* released on November 10, 1993, the Commission clarified that the correct figure to be used in the Line 123 calculation for the third quarter 1992 GNP-PI figure is 122.5, not 121.8.[27] Masada hadpample opportunity to account for this change in both its original filing and its revised filing given that Masada made its original filing one month after the *Public Notice* release date and made its revised filing two months after that date.

14. Moreover, we are unpersuaded by Masada's argument that use of the estimate is justified by the Commission's statement that "[r]ates set in accordance with then-current inflation and other data will not be deemed unreasonable solely on account of subsequent changes in that data."[28] This statement is not determinative in Masada's situation because Masada was not uniform in its use on Lines 122-127 of "then-current" data (i.e., data available when Masada made its original filing) and "updated" data (i.e., data available when Masada made its revised filing). Specifically, while Masada relied on the pre-September 1993 GNP-PI estimate of 121.8 on Line 123 (which would be the "then-current" data), Masada used updated data (125.6) on Line 122. Masada is not permitted to rely partially upon then-current data and partially upon updated data. In computing its inflation adjustment factor, Masada either must use then-current data on each of Lines 122-127, or it must use updated data for each line; it cannot use a combination of both. Accordingly, it was reasonable for the City to find Masada's inflation calculations to be defective.

15. For all these reasons, we will defer to the franchising authority's decision to rely on the information provided in Masada's original Form 393. The City's adoption of rates derived from Masada's original filing was a reasonable decision based on the best information available and does not constitute grounds for reversal. Because Masada bears the burden of proving the reasonableness of its rates, the City was under no legal obligation to consider Masada's revised Form 393 without an adequate explanation or justification from Masada, requiring the City to accept it for review. However, in this case, the City did review Masada's second filing and made a reasonable finding that it was defective. Therefore, by this order, we will uphold the City's rate order and deny Masada's appeal.

III. ORDERING CLAUSES

16. Accordingly, IT IS ORDERED that the appeal filed by Masada Cable Partners II, L.P. with regard to a local rate order adopted by the City of Gaffney, South Carolina IS DENIED. The City of Gaffney's rate order should be implemented by Masada without modification and within the time period specified by the terms of the rate order.

17. This action is taken by the Chief, Cable Services Bureau, pursuant to authority delegated by Section 0.321 of the Commission's rules. 47 C.F.R. § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

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[26] *See Third Reconsideration Order*, 9 FCC Rcd at 4349-50; 47 C.F.R. § 76.922(b)(9); *Public Notice*, Cable Television Rate Regulation: Questions and Answers Relating to FCC Form 393, Question No. 10 (July 30, 1993); *Public Notice*, Questions and Answers on Completion of FCC Form 393 and Associated Filing Requirements, Question No. 9 (November 10, 1993).

[27] *See Public Notice*, Questions and Answers on Completion of FCC Form 393 and Associated Filing Requirements, Question No. 9 (November 10, 1993) ("The Commission stated in a *Question and Answer* sheet released on July 30, 1993, that the most recently available GNP-PI should be used when making rate benchmark calculations. In this regard, the GNP-PI for the third quarter of 1992, which is listed in Form 393, Part II, Worksheet 1, was updated by the Department of Commerce on August 31, 1993 after the form was printed. The new number is 122.5. This updated number for the GNP-PI should be used rather than the number printed on the form.").

[28] *See Public Notice*, Questions and Answers on Cable Television Rate Regulation, Question No. 5 (June 1, 1994). When an operator's rate calculations are otherwise accurate, the operator will not be required to adjust its rates simply because of the use of "then-current" data. But when the operator's rates are not justified and must be recalculated for reasons other than use of "then-current" data, the operator will be required to make the necessary recalculations and use updated data in doing so. *See Third Reconsideration Order*, 9 FCC Rcd at 4349-50.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

HORIZON CABLE I LIMITED PARTNERSHIP

Petition for Reconsideration

of Cable Services Bureau Order
Denying Petition for Reconsideration
of Green Oak Township, Michigan's
Certification to Regulate Basic Cable
Service Rates (MI0905)

ORDER ON RECONSIDERATION

Adopted: February 17, 1995; Released: February 21, 1995

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. On December 15, 1994, Horizon Cable I Limited Partnership ("Horizon") filed a timely petition requesting reconsideration of a *Memorandum Opinion and Order* [1] (*"Order"*) adopted by the Cable Services Bureau ("the Bureau") pursuant to delegated authority. The *Order* denied Horizon's petition for reconsideration challenging the certification of Green Oak Township ("Green Oak") to regulate Horizon's rates for basic cable service and associated equipment.[2] In its petition, Horizon requests that the Bureau grant its petition for reconsideration, find that Horizon is subject to effective competition, and rescind Green Oak's certification. Green Oak Township did not file anopposition to Horizon's December 15, 1994 petition.[3]

II. BACKGROUND

2. Section 405 of the Communications Act of 1934, as amended, allows parties to petition for reconsideration of an order issued by the Commission or its delegated authority.[4] Such a petition must be filed within 30 days from the date of public notice of that action.[5] To warrant consideration, a petition for reconsideration must state the specific form(s) of relief sought by the petitioner and allege with particularity the respects in which the contested action should be changed.[6] The petition should also cite findings of fact or conclusions that the petitioner believes to be in error and indicate how the petitioner believes they should be changed.[7]

3. Section 623 (a)(4) of the Communications Act of 1934, as amended, allows franchising authorities to become certified to regulate the basic cable service rates of cable systems that are not subject to effective competition.[8] For the purposes of the initial request for certification, local franchising authorities may rely on a presumption that cable operators within their jurisdiction are not subject to effective competition, unless they have actual knowledge to the contrary.[9] Certification becomes effective 30 days from the date of filing unless the Commission finds that the franchising authority does not meet the statutory certification requirements.[10] Cable operators may file petitions for reconsideration of the franchising authority's certification within 30 days from the date such certification becomes effective.[11] Rate regulation is automatically stayed pending review of a timely-filed petition for reconsideration alleging the presence of effective competition.[12]

4. In its original petition for reconsideration, Horizon argued that its system was subject to effective competition in its franchise area. Horizon based its claim of effective competition on the allegation that its system's subscriber penetration rate was less than 30% of the "homes" in its franchise area.[13] To support its claim, Horizon submitted a copy of a computer printout which indicated that its system served 538 subscribers as of October 21, 1993. Horizon also provided a copy of 1990 Census data which indicated that there were 4,256 "housing units" within the franchise area. In addition, Horizon submitted a declaration under penalty of perjury by a responsible official certifying to the accuracy of the data included in the petition. Using these figures, Horizon argued that the ratio of total Horizon subscribers in relation to the total number of "housing

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[1] *Horizon Cable I Limited Partnership*, 9 FCC Rcd 7305 (1994).

[2] Green Oak Township filed its "Certification of Franchising Authority to Regulate Basic Cable Service Rates and Initial Finding of Lack of Effective Competition" ("FCC Form 328") with the Commission on October 1, 1993. Certification became effective on October 31, 1993.

[3] Section 1.106 of the Commission's rules provides that oppositions to petitions for reconsideration must be filed within 10 days of the date that the petition for reconsideration was filed.

[4] Communications Act of 1934 § 405; 47 U.S.C. § 405.

[5] Communications Act of 1934 § 405, 47 U.S.C. § 405; 47 C.F.R. § 1.106(f).

[6] 47 C.F.R. § 1.106(d)(1).

[7] 47 C.F.R. § 1.106(d)(2).

[8] Communications Act of 1934 § 623(a)(4), 47 U.S.C. § 543(a)(4).

[9] 47 C.F.R. §§ 76.906, 76.910(b)(4).

[10] 47 C.F.R. § 76.910(e). Certification becomes effective unless the Commission determines that: (1) the franchising authority will not adopt or administer rate regulations that are consistent with the Commission's regulations; (2) the franchising authority lacks the legal authority to adopt, or the personnel to administer, rate regulations; (3) procedural laws and regulations applicable to rate regulation proceedings by the franchising authority do not provide a reasonable opportunity for consideration of the views of interested parties; or (4) the cable system in question is subject to effective competition.47 C.F.R. § 76.910(b). *See also* Communications Act of 1934 § 623(a)(4), 47 U.S.C. § 543(a)(4).

[11] 47 C.F.R. §§ 1.106, 76.911; *Report and Order and Further Notice of Proposed Rulemaking*, MM Docket No. 92-266, 8 FCC Rcd 5631, 5693 (1993).

[12] 47 C.F.R. § 76.911(c).

[13] The 1992 Cable Act (Communications Act of 1934 § 623(a)(2), 47 U.S.C. § 543(a)(2) and the Commission's rules (47 C.F.R. § 76.905(a)) provide that only the rates of cable systems that are not subject to effective competition may be regulated. One of the bases by which a cable operator will be deemed subject to effective competition is if fewer than 30 percent of the households in the system's franchise area subscribe to the system's service. Communications Act of 1934 § 623(l)(1)(A), 47 U.S.C. § 543(l)(1)(A); 47 C.F.R. § 76.905(b)(1).

units" in the franchise area yielded a subscriber penetration rate of 13.0%. Because the penetration rate fell below 30%, Horizon argued that its system was subject to effective competition, and that Green Oak's certification to regulate Horizon's basic cable rates and associated equipment should be rescinded.

5. In its *Order*, the Bureau denied Horizon's petition for reconsideration because Horizon, in deriving its subscriber penetration rate, inappropriately relied upon "housing unit" data, rather than household ("occupied housing unit") data, to determine the total number of households in its franchise area. Specifically, the Bureau found that Horizon's "housing unit" count inappropriately included vacant housing units. Because Horizon failed to base its claim on "household" or "occupied housing unit" data, the Bureau rejected Horizon's claim of effective competition.

6. In its petition, Horizon now argues that the use of "household" (i.e., occupied housing unit) data confirms that its system's penetration level falls below 30%. Specifically, Horizon submits a copy of the relevant page from the 1990 Census which indicates that there are 3,892 occupied housing units in Horizon's franchise area. In addition, Horizon submits updated subscribership data which indicates that Horizon serves a total of 715 subscribers as of January 21, 1995. This yields a penetration level of 18.37%. As such, Horizon argues that the public interest warrants acceptance of this new data because it demonstrates that Horizon is subject to effective competition based on a low penetration level.

III. DISCUSSION

7. Generally, reconsideration is appropriate where the petitioner shows either a material error or omission in the original order or raises additional facts not known or not existing until after the petitioners last opportunity to present such matters.[14] A petition for reconsideration which relies on facts or information not previously presented to the Commission or its delegated authority may be considered if the Commission or delegated authority determines that consideration of such facts is required in the public interest.[15]

8. In its original petition, Horizon based its effective competition claim on housing unit data which inappropriately included vacant housing units. In this petition, however, Horizon now submits sufficient household (i.e., occupied housing units) data in support of its effective competition claim.[16]

9. Relying on this household data, we find that Horizon currently serves 715 subscribers in an area with 3,892 households (i.e., occupied housing units). This yields a penetration level of 18.37%. In light of this, we find that Horizon has submitted sufficient evidence demonstrating that it serves fewer than 30% of the households in its franchise area. Accordingly, its cable system is subject to effective competition and its petition is granted.

IV. ORDERING CLAUSES

10. Accordingly, IT IS ORDERED that the petition for reconsideration filed by Horizon Cable I Limited Partnership challenging the certification of Green Oak Township, Michigan to regulate basic cable rates IS GRANTED.

11. IT IS FURTHER ORDERED that the certification of Green Oak Township, Michigan to regulate the basic cable service rates of Horizon Cable I Limited Partnership IS RESCINDED.

12. This action is taken pursuant to delegated authority under Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

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[14] *WWIZ, Inc.*, 37 FCC 685, 686 (1964), *aff'd sub. nom. Lorain Journal v. FCC*, 351 F.2d 824 (D.C. Cir. 1965) *cert. denied*, 383 U.S. 967 (1966). *See also* 47 C.F.R. § 1.106(c)(2).

[15] 47 C.F.R. § 1.106(c)(2).

[16] Horizon provides no adequate reason as to why it failed to submit this data in its original petition, and thus, this pleading properly resembles a petition for revocation. Horizon claims that it had no notice that effective competition claims must be demonstrated by using "household" (*i.e.*, occupied housing unit) data. This argument lacks merit. Both the Cable Act and the Commission's rules require that effective competition be demonstrated based on the number of "households" in the franchise area. Communications Act of 1934 § 623(l)(1), 47 U.S.C. § 543(l)(1); 47 C.F.R. § 76.905 (b). As the Commission stated previously, "we presume that Congress did not intend 'households' to have a different meaning than in the 1990 Census that would include vacant units." *Third Order on Reconsideration*, MM Docket Nos. 92-266 and 92-262, 9 FCC Rcd 4316, 4324 (1994) (" *Third Recon. Order*"). The count of "households" in the 1990 Census reflects only occupied housing units. *See* Bureau of the Census, U.S. Dept. of Commerce, 1990 Census of Population, CP-1-1B, Appendix B at B-8. Nonetheless, we note that Section 623(a)(2) of the Communications Act of 1934, as amended, provides that only the rates of cable systems that are not subject to effective competition may be regulated. Moreover, we note that acceptance of this new data reveals that Horizon's penetration level is substantially below the penetration level needed to become subject to rate regulation. In light of these circumstances, we believe that the public interest requires acceptance of this information.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

MERCOM, INC. AND ITS SUBSIDIARY,
COMMUNICATIONS AND
CABLEVISION, INC.,
D/B/A RIVER RAISIN CABLEVISION

Petition for Reconsideration

of Cable Services Bureau Order
Denying Petition for Reconsideration
of the City of Monroe, Michigan's
Certification to Regulate Basic Cable
Service Rates (MI0765)

ORDER ON RECONSIDERATION

Adopted: February 17, 1995; Released: February 21, 1995

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. On January 11, 1995, Mercom, Inc. and its subsidiary, Communications and Cablevision, Inc., d/b/a River Raisin Cablevision, ("Mercom") filed a timely petition requesting reconsideration of a *Memorandum Opinion and Order*[1] (*"Order"*) adopted by the Cable Services Bureau ("the Bureau") pursuant to delegated authority. The *Order* denied Mercom's petition for reconsideration challenging the certification of the City of Monroe ("the City") to regulate rates for basic cable service and associated equipment.[2] In its petition, Mercom requests that the Bureau grant its petition for reconsideration, find that Mercom is subject to effective competition, and rescind the City's certification to regulate basic cable service rates. The City did not file an opposition to Mercom's January 11, 1995 petition.[3]

II. BACKGROUND

2. Section 405 of the Communications Act of 1934, as amended, allows parties to petition for reconsideration of an order issued by the Commission or its delegated authority.[4] Such a petition must be filed within 30 days from the date of public notice of that action.[5] To warrant consideration, a petition for reconsideration must state the specific form(s) of relief sought by the petitioner and allege with particularity the respects in which the contested action should be changed.[6] The petition should also cite findings of fact or conclusions that the petitioner believes to be in error and indicate how the petitioner believes they should be changed.[7]

3. Section 623 (a)(4) of the Communications Act of 1934, as amended, allows franchising authorities to become certified to regulate the basic cable service rates of cable systems that are not subject to effective competition.[8] For the purposes of the initial request for certification, local franchising authorities may rely on a presumption that cable operators within their jurisdiction are not subject to effective competition, unless they have actual knowledge to the contrary.[9] Certification becomes effective 30 days from the date of filing unless the Commission finds that the franchising authority does not meet the statutory certification requirements.[10] Cable operators may file petitions for reconsideration of the franchising authority's certification within 30 days from the date such certification becomes effective.[11] Rate regulation is automatically stayed pending review of a timely-filed petition for reconsideration (filed pursuant to Section 76.911 of the Commission's rules) alleging the presence of effective competition.[12]

4. In its original petition for reconsideration, Mercom argued that its system was subject to effective competition in its franchise area. Mercom based its claim of effective competition on the allegation that its system's subscriber penetration rate was less than 30% of the "homes" in its franchise area.[13] To support its claim, Mercom submitted evidence which indicated that its system served 77 subscribers in a franchise area consisting of 8,840 "housing units." Mercom also submitted a declaration under penalty of

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[1] *Mercom, Inc.*, DA 94-1443 (released Dec. 12, 1994).

[2] The City of Monroe filed its "Certification of Franchising Authority to Regulate Basic Cable Service Rates and Initial Finding of Lack of Effective Competition" ("FCC Form 328") on October 4, 1993. The certification became effective on November 3, 1993.

[3] Section 1.106 of the Commission's rules provides that oppositions to petitions for reconsideration must be filed within 10 days of the date that the petition for reconsideration was filed.

[4] Communications Act of 1934 § 405; 47 U.S.C. § 405.

[5] Communications Act of 1934 § 405; 47 U.S.C. § 405; 47 C.F.R. § 1.106(f).

[6] 47 C.F.R. § 1.106(d)(1).

[7] 47 C.F.R. § 1.106(d)(2).

[8] Communications Act of 1934 § 623(a)(4), 47 U.S.C. § 543(a)(4).

[9] 47 C.F.R. §§ 76.906, 76.910(b)(4).

[10] 47 C.F.R. § 76.910(e). Certification becomes effective unless the Commission determines that: (1) the franchising authority will not adopt or administer rate regulations that are consistent with the Commission's regulations; (2) the franchising authority lacks the legal authority to adopt, or the personnel to administer, rate regulations; (3) procedural laws and regulations applicable to rate regulation proceedings by the franchising authority do not provide a reasonable opportunity for consideration of the views of interested parties; or (4) the cable system in question is subject to effective competition. 47 C.F.R. § 76.910(b). *See also* Communications Act of 1934 § 623(a)(4), 47 U.S.C. § 543(a)(4).

[11] 47 C.F.R. §§ 1.106, 76.911; *Report and Order and Further Notice of Proposed Rulemaking*, MM Docket No. 92-266, 8 FCC Rcd 5631, 5693 (1993) (*"Rate Order"*).

[12] 47 C.F.R. § 76.911(c).

[13] The 1992 Cable Act (Communications Act of 1934 § 623(a)(2), 47 U.S.C. § 543(a)(2) and the Commission's rules (47 C.F.R. § 76.905(a)) provide that only the rates of cable systems that are not subject to effective competition may be regulated. One of the bases by which a cable operator will be deemed subject to effective competition is if fewer than 30 percent of the households in the system's franchise area subscribe to the system's service. Communications Act of 1934 § 623(l)(1)(A), 47 U.S.C. § 543(l)(1)(A); 47 C.F.R. § 76.905(b)(1).

perjury by a responsible official certifying to the accuracy of the data included in the petition. Using these figures, Mercom argued that the ratio of total Mercom subscribers in relation to the total number of housing units in the franchise area yielded a subscriber penetration rate of less than 1%. Because the penetration rate fell below 30%, Mercom argued that its system was subject to effective competition, and that the City's certification to regulate Mercom's basic rates and associated equipment should be rescinded.

5. In its *Order*, the Bureau denied Mercom's petition for reconsideration because Mercom, in deriving its penetration rate, inappropriately relied upon "housing unit" data, rather than household ("occupied housing unit") data, to determine the total number of households in its franchise area. Specifically, the Bureau found that Mercom's "housing unit" count inappropriately included vacant housing units. Because Mercom failed to base its claim on "household" or "occupied housing unit" data, the Bureau rejected Mercom's claim of effective competition.

6. In its petition, Mercom now argues that the use of "household" (i.e., occupied housing unit) data confirms that its system's penetration level falls below 30%. Specifically, Mercom submits updated subscribership data which indicates that Mercom serves a total of 70 subscribers as of October, 1994. In addition, Mercom provides the complete citation to the relevant page of 1990 Census data which demonstrates that there are 8,430 occupied housing units in Mercom's franchise area. This yields a penetration level of .83%. Mercom argues that the public interest warrants acceptance of this new data because it demonstrates that Mercom is subject to effective competition based on a low penetration level.

III. DISCUSSION

7. Generally, reconsideration is appropriate where the petitioner shows either a material error or omission in the original order or raises additional facts not known or not existing until after the petitioners last opportunity to present such matters.[14] A petition for reconsideration which relies on facts or information not previously presented to the Commission or its delegated authority may be considered if the Commission or delegated authority determines that consideration of such facts is required in the public interest.[15]

8. In its original petition, Mercom based its effective competition claim on housing unit data which inappropriately included vacant housing units. In this petition, however, Mercom now submits sufficient household (i.e., occupied housing unit) data in support of its effective competition claim.[16]

9. Relying on this household data, we find that Mercom serves 70 subscribers in an area with 8,430 households (i.e., occupied housing units). This yields a penetration level of .83%. In light of this, we find that Mercom has submitted sufficient evidence demonstrating that it serves fewer than 30% of the households in its franchise area. Accordingly, its cable system is subject to effective competition and its petition is granted.

IV. ORDERING CLAUSES

10. Accordingly, IT IS ORDERED that the petition for reconsideration filed by Mercom, Inc. and its subsidiary, Communications and Cablevision, Inc. d/b/a River Raisin Cablevision challenging the certification of the City of Monroe, Michigan to regulate basic cable rates, IS GRANTED.

11. IT IS FURTHER ORDERED that the certification of the City of Monroe, Michigan to regulate the basic cable service rates of Mercom, Inc. IS RESCINDED.

12. This action is taken pursuant to delegated authority under Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

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[14] *WWIZ, Inc.*, 37 FCC 685, 686 (1964), *aff'd sub. nom. Lorain Journal v. FCC*, 351 F.2d 824 (D.C. Cir. 1965) *cert. denied*, 383 U.S. 967 (1966). *See also*, 47 C.F.R. § 1.106(c)(2).

[15] 47 C.F.R. § 1.106(c)(2).

[16] Mercom provides no adequate reason as to why it failed to submit this data in its original petition, and thus, this pleading properly resembles a petition for revocation. Mercom claims that it had no notice that effective competition claims must be demonstrated by using "household" (*i.e.*, occupied housing unit) data. This argument lacks merit. Both the Cable Act and the Commission's rules require that effective competition be demonstrated based on the number of "households" in the franchise area. Communications Act of 1934 § 623(l)(1), 47 U.S.C. § 543(l)(1); 47 C.F.R. § 76.905 (b). As the Commission stated previously, "we presume that Congress did not intend 'households' to have a different meaning than in the 1990 Census that would include vacant units." *Third Order on Reconsideration*, MM Docket Nos. 92-266 and 92-262, 9 FCC Rcd 4316, 4324 (1994) (*"Third Recon. Order"*). The count of "households" in the 1990 Census reflects only occupied housing units. *See* Bureau of the Census, U.S. Dept. of Commerce, 1990 Census of Population, CP-1-1B, Appendix B at B-8. Nonetheless, we note that Section 623(a)(2) of the Communications Act of 1934, as amended, provides that only the rates of cable systems that are not subject to effective competition may be regulated. Moreover, we note that acceptance of this new data reveals that Mercom's penetration level is substantially below the penetration level needed to become subject to rate regulation. In light of these circumstances, we believe that the public interest requires acceptance of this information.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the matter of

TCI Cablevision of Greater Michigan, Inc.	CUID Nos. MI0025, MI0056, MI0057,
Township of Muskegon, Michigan	MI0159, MI0193,
City of Muskegon, Michigan	MI0270, MI0271,
City of North Muskegon, Michigan	MI0505, MI0506,
City of Roosevelt Park, Michigan	MI1260, MI1261
City of Norton Shores, Michigan	and MI1262
Township of Laketon, Michigan	
Township of Fruitport, Michigan	
City of Ferrysburg, Michigan	
Township of Egelston, Michigan	
Township of Cedar Creek, Michigan	
Township of Fruitland, Michigan	
Township of Spring Lake, Michigan	

Benchmark Filing To Support
Cable Programming Service Prices

MEMORANDUM OPINION AND ORDER

Adopted: February 17, 1995; Released: February 21, 1995

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. Here we consider complaints about the price TCI Cablevision of Greater Michigan, Inc. ("TCI") was charging for its cable programming service ("CPS") tier in the Muskegon County, Michigan, communities designated by the community unit identification ("CUID") numbers referenced above. TCI serves each of these communities from the same headend and TCI has chosen to attempt to justify its price through a benchmark showing by filing amended FCC Form 393s for each of these communities that are identical in all respects. This order addresses the reasonableness of TCI's CPS tier price for each of these communities only through May 14, 1994. At a later time we will issue a separate order addressing the reasonableness of the price for each of these communities after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act"),[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its rates through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

II. PROCEDURAL MATTERS

4. The first valid CPS complaints in the franchise areas addressed in this Order were completed and served on TCI and received by the Commission on the dates set forth in Appendix A.

5. TCI attempted to justify its CPS price for each franchise area through identical FCC Form 393s filed on the dates noted in Appendix B. On May 27, 1994, in response to a Cable Services Bureau Order citing common deficiencies observed in benchmark filings generally,[11] TCI attempted to justify its CPS price by filing amended FCC Form 393s that were identical in all respects for each franchise area. Subsequently, TCI amended its justifications

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[1] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent TCI has sought to take advantage of the refund deferral period under the *Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking*, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (1994) (*"Second Order on Reconsideration"*), the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which TCI implemented its CPS price under the new regulations. *See* para. 3, *infra*. Furthermore, to the extent that the price for the period ending May 14, 1994 is found to be excessive, reductions in TCI's price for the period after May 14, 1994 may be required to reflect the fact that TCI's price during the earlier period, which is used as the starting point to calculate its price for the prospective period, was unreasonable. *See* 47 C.F.R. § 76.922(b)(4)(C).

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993) .

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] *Order*, MM Docket No. 92-266, *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] *Second Order on Reconsideration;* 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration* at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration* at 4189 n.195.

[11] *Cable Operators' Rate Justification Filings*, DA 94-526, 9 FCC Rcd 7752 (Cab. Serv. Bur. 1994).

twice: on December 23, 1994, in response to a Commission letter which requested clarification of TCI's amended showing;([12] and on January 20, 1995, in response to a second Commission letter which requested further clarification.[13]

6. On May 31, 1994, local franchising authorities ("LFAs") for eight of the franchising areas under consideration in this Order filed identical motions captioned as a "Request For Default and To Supplement the Record."[14] The LFAs request that we find TCI in default for its failure to file and serve timely and proper responses to their rate complaints. The LFAs state that TCI filed its rate justifications late, in an incomplete fashion and not on the proper form. They also state that in February 1994,TCI began charging a home wire maintenance fee which is not reflected in its rate justification filings. In addition, the LFAs argue that TCI incorrectly counted the number of satellite channels in its rate justifications.

7. In response, we note that on May 27, 1994, TCI did file its rate justifications on the proper form within the "window of opportunity" established in our May 23, 1994 Order.[15] We also note that while TCI may have filed its rate justifications in an untimely fashion, we calculate the Inflation Adjustment Factor for each franchise area based on the date TCI should have used in justifying its rate for that franchise area. With regard to TCI's satellite channel count, we note that this issue was the subject of a Commission deficiency letter to which TCI responded on December 23, 1994. TCI states that it served its response on the LFAs. The wire maintenance fee issue is addressed below. Accordingly, we grant in part and deny in part the LFAs' motions.

III. DISCUSSION

8. TCI asserts that its monthly CPS tier price of $10.88 per subscriber is justified by its benchmark filings because its price is equal to the maximum permitted charge of $10.88 as calculated in its amended filings. Upon review, however, we have determined that TCI has not correctly calculated its maximum permitted price, and it is therefore appropriate to make the following adjustment to TCI's calculations in the Form 393s:

a. The 1992 Cable Act requires operators to fully unbundle equipment and installation costs from programming costs.[16] The Commission's regulations implement Congress's directive by requiring operators to establish an equipment basket.[17] Section 76.923(c) of the Commission's regulations specifically states that equipment basket costs shall include "the direct and indirect material and labor costs of providing, leasing, installing, repairing, and servicing customer equipment." In its Order adopting rate regulations, the Commission amplified this regulation by stating that "[t]he basket will include an allocation of all those system joint and common costs that service installation, leasing, and equipment repair share with other system activities, excluding general system overhead."[18] When completed correctly Part III of FCC Form 393 unbundles equipment costs from programming costs.

b. TCI, however, has not properly completed Part III of its FCC Form 393s and thus has not completely unbundled equipment and installation costs from programming costs as directed by the 1992 Cable Act and the Commission's regulations. Specifically, on Schedule A of Part III TCI has not reported any maintenance facility cost for installations and service of customer leased equipment, and on Schedule B it has not reported any costs for utilities. The lack of maintenance facility and utility costs might be correct if TCI's Schedule B allocations reflected that contract or third-party labor was performing all equipment installations and repairs. The allocations that TCI makes in its Schedule B Analysis, however, indicate that its own employees performed customer equipment installation and maintenance.

c. Not only are TCI's Schedule B allocations inconsistent with not having any maintenance facility costs, its allocations are also inconsistent with its response to the Commission's second deficiency letter. In its response TCI states that "[t]he actual repair of these converters is performed by a third party off premises."[19] This response indicates that there should be an allocation representing the cost of third-party or contract labor. TCI's Schedule B Analysis, however, does not allocate any contract labor to customer equipment installation and maintenance.

d. TCI has included on its Schedule B Analysis an entry of $3,096.91 for "Converter Maintenance." This entry, however, further indicates that TCI has not fully unbundled its equipment costs from its regulated service costs. In its Part III, Step C, Line 9 explanation, TCI states that it devoted 2,562 hours to maintenance and service of remotes and converters.[20] This number of hours allocated to maintenance and service of remotes and converters is inconsistent with having a converter maintenance cost of $3,096.91. Even assuming that $3,096.91 is intended to represent only TCI's labor costs, this would indicate a cost

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[12] Letter from Elias G. Johnson, FCC, to Keith Heffron, TCI Great Lakes, Inc. (Dec. 9, 1994).

[13] Letter from Elias G. Johnson, FCC, to Keith Heffron, TCI Great Lakes, Inc. (Jan. 13, 1995).

[14] These motions were filed by the following LFAs: Charter Township of Muskegon, Michigan (CUID No. MI0025); City of Muskegon, Michigan (CUID No. MI0056); City of North Muskegon, Michigan (CUID No. MI0057); Township of Laketon, Michigan (CUID No. MI0270); Township of Fruitport, Michigan (CUID No. MI0271); City of Ferrysburg, Michigan (CUID No. MI0505); Township of Egelston, Michigan (CUID No. MI0506); and Township of Cedar Creek, Michigan (CUID No. MI1260).

[15] *Cable Operators' Rate Justification Filings*, DA 94-526, 9 FCC Rcd 7752 (Cab. Serv. Bur. 1994).

[16] 47 U.S.C. § 543(b)(3).

[17] 47 C.F.R. § 76.923(b).

[18] *Report and Order and Further Notice of Proposed Rulemaking*, MM Docket No. 92-266, FCC 93-177, 8 FCC Rcd 5631 at 5815, ¶ 295 (1993) (footnote omitted). *See also First Order on Reconsideration, Second Report and Order, and Third Notice of Proposed Rulemaking*, MM Docket No. 92-266, FCC 93-428, 9 FCC Rcd 1164 at 1190, ¶ 47 (1993).

[19] Letter from Keith Heffron, TCI Great Lakes, Inc., to Elias G. Johnson, FCC (Jan. 20, 1995).

[20] *See also* TCI's FCC Form 393s at Part III, Line 9 and both Lines 16s.

to TCI of only $1.21 per hour, clearly an implausible figure. Thus, $3,096.91 cannot represent all of TCI's converter maintenance costs, and there must remain costs related to installations and service of customer leased equipment that TCI has not included on Form 393, Part III.[21]

e. TCI has not justified its Part III allocations and has failed to correct its allocations even after receiving two deficiency letters. The Commission has repeatedly stated that where an operator does not provide adequate information to justify its rate, the Commission will set the maximum permitted rate based on the best evidence available to it.[22] Simply put, TCI cannot be permitted to delay subscriber refunds by failing to provide information that is needed to determine a maximum permitted rate. Since TCI has not justified its Part III allocations and has not calculated an acceptable figure for unbundling equipment and installation costs from programming costs, we must impute an estimated equipment cost figure. We have determined based on the best evidence available to us at this time that TCI's Part II, Worksheet 3, Line 303 entry should be $0.060 of installation and customer equipment costs per subscriber per channel. We have derived this figure by analyzing a sample of other operators' FCC Form 393 filings, including both filings as to which we have already issued orders and filings that are currently under review, and we have observed that generally operators have an average unbundling figure of $0.06 per subscriber per channel.[23] We have further determined that in order to yield an unbundling figure of $0.060 per subscriber per channel, TCI must have incurred $60,741.00 of installation and customer equipment costs, and we have therefore entered this figure on Part II, Worksheet 1, Line 104 and Part II, Worksheet 3, Line 301. While we recognize that this is not an ideal way to determine the correct amount of costs to unbundle and thus to derive a maximum permitted CPS rate, it is the only approach available to us where an operator does not supply sufficient information to justify its price.

9. Because of this error, we conclude that TCI has failed to demonstrate that its maximum permitted price for the CPS tier was not unreasonable. We will therefore set a maximum permitted price for this tier, incorporating the adjustment discussed above. In doing so, we must also recalculate the Inflation Adjustment Factor in Form 393, Part II, Worksheets 1 and 4.

a. On its amended Form 393s, TCI calculated the Inflation Adjustment Factor as of the end of October 1993 using data released on July 31, 1993. For CUID Nos. MI0271, MI1260, MI1261 and MI1262, October 31, 1993, is a permissible base date. We must, however, recalculate the Inflation Adjustment Factor for these four franchise areas using the most accurate data currently available for the date for which TCI filed.[24] On July 29, 1994, the U.S. Department of Commerce released corrected inflation data including Gross National Product Price Index ("GNP-PI") figures of 122.3 for the third quarter of 1992 and 125.7 for the fourth quarter of 1993. Using these GNP-PI figures, we calculate an Inflation Adjustment Factor through October 1993, the base date TCI used in justifying its rates for CUID Nos. MI0271, MI1260, MI1261 and MI1262, of 1.030.[25]

b. For CUID Nos. MI0025, MI0056, MI0057, MI0159, MI0193, MI0270, MI0505 and MI0506, however, TCI cannot permissibly calculate inflation through the end of October 1993. In these franchise areas, TCI was served with rate complaints in September 1993.[26] The instructions to FCC Form 393, page 11, require that the Inflation Adjustment Factor be calculated using "the number of whole months from September 30, 1992 to the date you will submit this form." In general, a cable operator must submit a justification of its rates no more than 30 days after service of 8the earliest valid complaint.[27] TCI cannot be permitted to claim an additional inflation adjustment simply because it did not file its Form 393s within this 30-day period. For these franchise areas, therefore, we must recalculate the Inflation Adjustment Factor on the basis of the most accurate data currently available for the latest date contemplated by the Form 393 instructions. On July 29, 1994, the U.S. Department of Commerce released corrected inflation data including Gross National Product Price Index ("GNP-PI") figures of 122.3 for the third quarter of 1992 and 125.7 for the fourth quarter of 1993. Using these GNP-PI figures, we calculate an Inflation Adjustment Factor through September 1993, the base date TCI should have used in justifying its rates for CUID Nos. MI0025, MI0056, MI0057, MI0159, MI0193, MI0270, MI0505 and MI0506, of 1.028.[28]

10. For CUID Nos. MI0271, MI1260, MI1261 and MI1262, these adjustments have the cumulative effect of reducing the maximum permitted monthly CPS tier price from $10.88 (as TCI calculated) to $10.24. For CUID Nos.

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[21] We also note that TCI has failed correctly to gross-up its taxes on Schedules A and C. We further note that if, as the LFAs assert, TCI is charging a wire maintenance fee we would expect to see these costs reflected in TCI's rate justification filings. Both of these facts provide additional evidence that TCI has not fully unbundled its equipment costs from its programming costs, and our calculation of an imputed equipment cost figure is intended to correct for any distortion of TCI's permitted rates that may be caused by these errors.

[22] *See Third Order on Reconsideration*, MM Docket Nos. 92-266 and 92-262, FCC 94-90, 9 FCC Rcd 4316 at 4348, ¶ 90 (1994); *Cable Operators' Rate Justification Filings*, DA 94-526, 9 FCC Rcd 7752 (Cab. Serv. Bur. 1994).

[23] *Cf. United Video Cablevision, Inc.*, CUID Nos. MA0333 and MA0334, DA 94-1144, at ¶10 (b) n.24 (Cab. Serv. Bur. released Nov. 9, 1994) (utilizing observed industry average depreciation lives where operator without explanation departed substantially from industry norms in cost-of-service justification).

[24] *See* 47 C.F.R. § 76.922(b)(9)(iii) (if a cable operator fails to justify its rates, rates must be adjusted in accordance with the most accurate data available at the time of analysis).

[25] *See* Appendix C.

[26] *See* Appendix A.

[27] *See* 47 C.F.R. § 76.956(a).

[28] *See* Appendix C.

MI0025, MI0056, MI0057, MI0159, MI0193, MI0270, MI0505 and MI0506, these adjustments have the cumulative effect of reducing the maximum permitted monthly CPS tier price from $10.88 (as TCI calculated) to $10.21.

IV. CONCLUSIONS

11. Upon review of the record herein, we conclude that TCI's showing for CUID Nos. MI0271, MI1260, MI1261 and MI1262 supports a maximum reasonable CPS tier price of $10.24 per month (plus franchise fee) for the period from the filing of the earliest complaint in each franchise area (as set forth on Appendix A) to May 14, 1994. We also conclude that TCI's showing for CUID Nos. MI0025, MI0056, MI0057, MI0159, MI0193, MI0270, MI0505 and MI0506 supports a maximum reasonable CPS tier price of $10.21 per month (plus franchise fee) for the period from the filing of the earliest complaint in each franchise area (as set forth on Appendix A) to May 14, 1994.[29] We further determine that with respect to each of the franchise areas discussed in this Order we will order appropriate refunds pursuant to Section 76.957 of the Commission's Rules, 47 C.F.R. § 76.957, in order to reimburse subscribers for the amount they paid in excess of a reasonable price.

12. We further conclude that for the period after May 14, 1994, TCI must reflect in its Form 1200 rate filings for each of the franchise areas addressed in this Order the fact that TCI's prices during the earlier period were unreasonable.[30] We reserve the right to make further adjustments to TCI's prices for the period after May 14, 1994, upon completion of our review of TCI's FCC Form 1200 rate filings.

13. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the complaints referred to in Appendix A against the cable programming service price charged by TCI Cablevision of Greater Michigan, Inc. in the Township of Muskegon, Michigan, CUID No. MI0025; City of Muskegon, Michigan, CUID No. MI0056; City of North Muskegon, Michigan, CUID No. MI0057; City of Roosevelt Park, Michigan, CUID No. MI0159; City of Norton Shores, Michigan, CUID No. MI0193; Township of Laketon, Michigan, CUID No. MI0270; Township of Fruitport, Michigan, CUID No. MI0271; City of Ferrysburg, Michigan, CUID No. MI0505; Township of Egelston, Michigan, CUID No. MI0506; Township of Cedar Creek, Michigan, CUID No. MI1260; Township of Fruitland, Michigan, CUID No. MI1261; and Township of Spring Lake, Michigan, CUID No. MI1262, and all other complaints in these franchise areas related to the same price, ARE GRANTED TO THE EXTENT INDICATED HEREIN.

14. IT IS FURTHER ORDERED that the May 31, 1994, motions filed by the local franchising authorities for the Township of Muskegon, Michigan, CUID No. MI0025; City of Muskegon, Michigan, CUID No. MI0056; City of North Muskegon, Michigan, CUID No MI0057; Township of Laketon, Michigan, CUID No. MI0270; Township of Fruitport, Michigan, CUID No. MI0271; City of Ferrysburg, Michigan, CUID No. MI0505; Township of Egelston, Michigan, CUID No. MI0506; and Township of Cedar Creek, Michigan, CUID No. MI1260 ARE GRANTED AND DENIED TO THE EXTENT INDICATED HEREIN.

15. IT IS FURTHER ORDERED that the benchmark filings submitted by TCI Cablevision of Greater Michigan, Inc. with respect to the Township of Fruitport, Michigan, CUID No. MI0271; Township of Cedar Creek, Michigan, CUID No. MI1260; Township of Fruitland, Michigan, CUID No. MI1261; and Township of Spring Lake, Michigan, CUID No. MI1262, for the period beginning with the filing of the first valid complaint in each franchise area (as set forth in Appendix A) and ending on May 14, 1994, justify a maximum price of $10.24 per month (plus franchise fee) for TCI Cablevision of Greater Michigan, Inc.'s cable programming service tier.

16. IT IS FURTHER ORDERED that the benchmark filings submitted by TCI Cablevision of Greater Michigan, Inc. with respect to the Township of Muskegon, Michigan, CUID No. MI0025; City of Muskegon, Michigan, CUID No. MI0056; City of North Muskegon, Michigan, CUID No. MI0057; City of Roosevelt Park, Michigan, CUID No. MI0159; City of Norton Shores, Michigan, CUID No. MI0193; Township of Laketon, Michigan, CUID No. MI0270; City of Ferrysburg, Michigan, CUID No. MI0505; and Township of Egelston, Michigan, CUID No. MI0506, for the period beginning with the filing of the first valid complaint in each franchise area (as set forth in Appendix A) and ending on May 14, 1994, justify a maximum price of $10.21 per month (plus franchise fee) for TCI Cablevision of Greater Michigan, Inc.'s cable programming service tier.

17. IT IS FURTHER ORDERED, pursuant to Section 76.961 of the Commission's Rules, 47 C.F.R. §76.961, that TCI Cablevision of Greater Michigan, Inc. shall refund to subscribers in the Township of Fruitport, Michigan, CUID No. MI0271; Township of Cedar Creek, Michigan, CUID No. MI1260; Township of Fruitland, Michigan, CUID No. MI1261; and Township of Spring Lake, Michigan, CUID No. MI1262, that portion of the amounts paid for cable programming service for the period from the filing of the first valid complaint in each franchise area (as set forth in Appendix A)[31] to May 14, 1994, that exceeded $10.24 (plus franchise fee) per month and was thus unreasonable, plus interest to the date of the refund.

18. IT IS FURTHER ORDERED, pursuant to Section 76.961 of the Commission's Rules, 47 C.F.R. §76.961, that TCI Cablevision of Greater Michigan, Inc. shall refund to subscribers in the Township of Muskegon, Michigan, CUID No. MI0025; City of Muskegon, Michigan, CUID No. MI0056; City of North Muskegon, Michigan, CUID No. MI0057; City of Roosevelt Park, Michigan, CUID No. MI0159; City of Norton Shores, Michigan, CUID No.

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[29] These findings are based solely on the representations of TCI listed in paragraph 5, *supra*, and the modifications described in paragraphs 8 and 9, *supra*. Should information come to our attention that these representations were inaccurate in any material way, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

[30] We reviewed TCI's Form 1200 rate filings and confirmed that TCI calculated its rates for the period after May 14, 1994 using the rate that we find in this Order to be unreasonable.

[31] Our jurisdiction to order a refund dates from the earliest date a valid complaint is filed with the Commission.47 C.F.R. § 76.961(b).

MI0193; Township of Laketon, Michigan, CUID No. MI0270; City of Ferrysburg, Michigan, CUID No. MI0505; and Township of Egelston, Michigan, CUID No. MI0506, that portion of the amounts paid for cable programming service for the period from the filing of the first valid complaint in each franchise area (as set forth in Appendix A) to May 14, 1994, that exceeded $10.21 (plus franchise fee) per month and was thus unreasonable, plus interest to the date of the refund.

19. IT IS FURTHER ORDERED that TCI Cablevision of Greater Michigan, Inc. shall promptly determine the overcharges to CPS subscribers in each franchise area for the stated period, and shall within 30 days of the release of this Order file a report with the Chief, Cable Services Bureau, stating the cumulative refund amounts so determined (including franchise fees and interest), describing the calculation thereof, and describing its plan to implement the refunds within 60 days of Commission approval thereof.

20. IT IS FURTHER ORDERED, pursuant to Section 76.922(b)(4)(C) of the Commission's rules, 47 C.F.R. § 76.922(b)(4)(C), that TCI Cablevision of Greater Michigan, Inc. shall, within 30 days of the release of this Order, revise its Form 1200 filings with respect to its franchise areas in the Township of Muskegon, Michigan, CUID No. MI0025; City of Muskegon, Michigan, CUID No. MI0056; City of North Muskegon, Michigan, CUID No. MI0057; City of Roosevelt Park, Michigan, CUID No. MI0159; City of Norton Shores, Michigan, CUID No. MI0193; Township of Laketon, Michigan, CUID No. MI0270; Township of Fruitport, Michigan, CUID No. MI0271; City of Ferrysburg, Michigan, CUID No. MI0505; Township of Egelston, Michigan, CUID No. MI0506; Township of Cedar Creek, Michigan, CUID No. MI1260; Township of Fruitland, Michigan, CUID No. MI1261; and Township of Spring Lake, Michigan, CUID No. MI1262, for the period beginning May 15, 1994, to reduce the monthly charge per tier as of March 31, 1994 for Tier 2 (Line A6b) to equal the maximum price for that franchise area (plus franchise fee).

21. IT IS FURTHER ORDERED that TCI Cablevision of Greater Michigan, Inc. shall place into effect, within 30 days after its submission of the revised Form 1200 filing required above, a CPS tier price that reflects the reduction in the CPS rate determined in this Order for its franchise areas in the Township of Muskegon, Michigan, CUID No. MI0025; City of Muskegon, Michigan, CUID No. MI0056; City of North Muskegon, Michigan, CUID No. MI0057; City of Roosevelt Park, Michigan, CUID No. MI0159; City of Norton Shores, Michigan, CUID No. MI0193; Township of Laketon, Michigan, CUID No. MI0270; Township of Fruitport, Michigan, CUID No. MI0271; City of Ferrysburg, Michigan, CUID No. MI0505; Township of Egelston, Michigan, CUID No. MI0506; Township of Cedar Creek, Michigan, CUID No. MI1260; Township of Fruitland, Michigan, CUID No. MI1261; and Township of Spring Lake, Michigan, CUID No. MI1262.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

Appendix A

CUID No.	Date First Complaint Filed with FCC	Date Complaint Served
MI0025	10/4/93	9/29/93
MI0056	10/4/93	9/28/93
MI0057	9/27/93	9/24/93
MI0159	10/15/93	9/20/93
MI0193	10/15/93	9/21/93
MI0270	9/27/93	9/24/93
MI0271	10/22/93	10/14/93
MI0505	10/4/93	9/28/93
MI0506	9/28/93	9/24/93
MI1260	1/3/94	12/22/93
MI1261	2/17/94	2/17/94
MI1262	11/23/93	11/19/93

Appendix B

CUID No.	393 Filing Dates Prior to May 27, 1994
MI0025	1/10/94
MI0056	1/10/94
MI0057	11/15/93; 12/2/93; 12/8/93
MI0159	12/2/93; 12/8/93
MI0193	12/2/93; 12/8/93
MI0270	11/15/93; 12/2/93; 12/8/93; 1/10/93
MI0271	1/10/94
MI0505	1/10/94
MI0506	12/2/93; 12/8/93
MI1260	3/10/94
MI1261	1/10/94
MI1262	1/10/94

Appendix C

CUID No.	Inflation Adjustment Factor	Maximum Permitted Price
MI0025	1.028	$10.21
MI0056	1.028	$10.21
MI0057	1.028	$10.21
MI0159	1.028	$10.21
MI0193	1.028	$10.21
MI0270	1.028	$10.21
MI0271	1.030	$10.24
MI0505	1.028	$10.21
MI0506	1.028	$10.21
MI1260	1.030	$10.24
MI1261	1.030	$10.24
MI1262	1.030	$10.24

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Viacom Cable — CUID Nos. CA0093, CA0094
Red Bluff, California

Benchmark Filings to Support
Cable Programming Service Price

MEMORANDUM OPINION AND ORDER

Adopted: February 17, 1995; Released: February 21, 1995

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. Here we consider complaints about the price Viacom Cable ("Viacom") was charging for its cable programming service ("CPS") tier in the City of Red Bluff, California, CUID No. CA0093, and Tehama County-Red Bluff, California, CUID No. CA0094. Viacom has chosen to attempt to justify its price through benchmark showings on FCC Form 393. This Order addresses the reasonableness of Viacom's price only through May 14, 1994. At a later date we will issue a separate order addressing the reasonableness of the price after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

II. PROCEDURAL MATTERS

4. The first valid CPS complaints in the franchise areas addressed in this Order were completed and served on Viacom and received by the Commission on the dates set forth in Appendix A.

5. Viacom filed its first FCC Form 393 filings in the franchise areas addressed in this Order on December 21, 1993. Viacom filed amended FCC Form 393 filings for both franchise areas on June 27, 1994 in response to a Cable Services Bureau Order citing common deficiencies observed in benchmark filings generally[11] and on February 8, 1995 in response to a Cable Services Bureau Public Notice offering operators the opportunity to make optional supplemental filings.[12]

III. DISCUSSION

6. Viacom asserts that its monthly CPS tier price of $11.84 per subscriber is justified by its benchmark filings because its price is approximately equal to the maximum permitted charges as calculated in the filings. However, upon review we have determined that Viacom has not correctly calculated its maximum permitted price, and it is therefore appropriate to make the following adjustment to Viacom's calculations in Form 393:

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[1] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Viacom has sought to take advantage of the refund deferral period under the *Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking*, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (1994) (*"Second Order on Reconsideration"*), the maximum permitted CPS prices determined herein might also apply from May 15, 1994 until the date on which Viacom implemented its CPS prices under the new regulations. *See* para. 3, *infra*. Further, to the extent that the prices for the period ending May 14, 1994 are found to be excessive, reductions in Viacom's prices for the period after May 14, 1994 may be required to reflect the fact that Viacom's prices during the earlier period, which are used as the starting point to calculate its prices for the prospective period, were unreasonable. *See* 47 C.F.R. § 76.922(b)(4)(C).

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] *Order* in MM Docket No. 92-266, *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] *See Second Order on Reconsideration* at 4119; 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration* at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration* at 4189 n.195.

[11] *Cable Operators' Rate Justification Filings*, DA 94-526, 9 FCC Rcd 7752 (Cab. Serv. Bur. 1994).

[12] *Public Notice: Cable Services Bureau Announces Optional Procedures with Respect to Pending Pre-May 15 Benchmark Cases*, DA 94-1556 (Dec. 29, 1994); *see also Public Notice: Cable Services Bureau Announces Extension of Time to File Under Optional Procedures Plan with Respect to Pending Pre-May 15 Benchmark Cases*, DA 95-87 (Jan. 20, 1995).

a. In its amended filings of June 27, 1994, Viacom states that it calculated the Inflation Adjustment Factor (Form 393, Part II, Worksheet 1, Line 127, and Form 393, Part II, Worksheet 4, Line 401) using data it relied on when it set its CPS price. If Viacom had done so correctly (i.e., if it had completed Form 393 with accurate data, including the most recent inflation data available as of the time it set its price), and if based on this data Form 393 indicated that its price was reasonable, then Viacom would have successfully justified its price under paragraph 94 of the *Third Order on Reconsideration*.[13] However, the figures Viacom used are not consistent with data on which it should have relied in setting its CPS price. Specifically, Viacom used data released by the U.S. Department of Commerce on August 31, 1993, to complete Lines 122 and 125, but used earlier data to calculate the Inflation Factor on Line 123. Furthermore, Viacom claimed an Adjustment Time Period extending through November 1993 (Line 124), which is inconsistent with an attempt to justify rates based on August 1993 data. Viacom's calculation of the Inflation Adjustment Factor is thus incorrect.

b. We must therefore recalculate the Inflation Adjustment Factor on the basis of the most accurate data currently available for the date on of which Viacom filed.[14] On its amended Forms 393, Viacom entered 14 months on Line 124, indicating that these filings were as of the end of November 1993. On July 29, 1994, the Department of Commerce released corrected inflation data including Gross National Product Price Index (GNP-PI) figures of 122.3 for the third quarter of 1992 and 125.7 for the third quarter of 1993. Using these GNP-PI figures, we calculate an Inflation Adjustment Factor through November 1993, the base date Viacom used in justifying its rates, of 1.032. This adjustment is consistent with the Inflation Adjustment Factor that Viacom used in its optional filing of February 8, 1995.

c. In its February 8, 1995 optional filing, Viacom reduced the number of satellite channels as of the initial date of regulation that it used to calculate the benchmark on Form 393, Part II, Worksheet 1, Line 121 from 24 to 23 and also reduced the number of satellite channels as of September 30, 1992 that Viacom used to calculate the benchmark on Form 393, Part II, Worksheet 2, Line 220 from 20 to 19. We rely on these revisions to recompute Viacom's maximum permitted rate.

7. Because of these errors, we conclude that Viacom has failed to demonstrate that its price for the CPS tier was not unreasonable. We will therefore set prices for this tier, incorporating the adjustments discussed above. These adjustments have the effect of reducing the maximum permitted monthly CPS tier price for each franchise area to the levels set forth in Appendix B.

IV. CONCLUSIONS

8. Upon review of the record herein, we conclude that Viacom's showing supports the maximum reasonable CPS tier price for each franchise area set forth in Appendix B (plus franchise fee) for the period from the filing of the earliest complaint in each franchise area (as set forth on Appendix A) to May 14, 1994.[15] We further determine that we will order appropriate refunds pursuant to Section 76.957 of the Commission's Rules, 47 C.F.R. § 76.957, in order to reimburse subscribers for the amount they paid in excess of a reasonable price.

9. We further conclude that Viacom must reflect in its FCC Form 1200 rate filings for the period after May 14, 1994 the fact that Viacom's price during the earlier period was unreasonable.[16] We reserve the right to make further adjustments to Viacom's prices for the period after May 14, 1994, upon completion of our review of Viacom's FCC Form 1200 rate filings.

10. We further conclude that Viacom has submitted in good faith an optional supplemental filing in response to our December 29, 1994 Public Notice.[17] As provided in the Public Notice, we will relieve Viacom of its obligation to obtain advance Commission approval of adjustments to its CPS prices for one year following the release of this Order.

11. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the complaints referred to in Appendix A against the cable programming service price charged by Viacom Cable in the City of Red Bluff, California, CUID No. CA0093, and Tehama County-Red Bluff, California, CUID No. CA0094, and all other complaints in these franchise areas related to the same price, ARE GRANTED TO THE EXTENT INDICATED HEREIN.

12. IT IS FURTHER ORDERED that the benchmark filings submitted by Viacom Cable with respect to Red Bluff, California, CUID No. CA0093, and Tehama County-Red Bluff, California, CUID No. CA0094, for the period beginning with the filing of the first valid complaint in each franchise area and ending on May 14, 1994, as set forth on Appendix A, justify the maximum price in each franchise area set forth in Appendix B (plus franchise fee) for Viacom Cable's cable programming service tier.

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[13] *Third Order on Reconsideration*, MM Docket Nos. 92-266 and 92-262, FCC 94-40, 9 FCC Rcd 4316 (1994) (*"Third Order on Reconsideration"*).

[14] *See* 47 C.F.R. § 76.922(b)(9)(iii) (if a cable operator fails to justify its rates, rates must be adjusted in accordance with the most accurate data available at the time of analysis).

[15] This finding is based solely on the representations of Viacom listed in paragraph 5, *supra*, and the modifications described in paragraph 6, *supra*. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

[16] We reviewed Viacom's FCC Form 1200 rate filings and confirmed that Viacom calculated its rates for the period after May 14, 1994 using the rates that we find in this Order to be unreasonable.

[17] *Public Notice: Cable Services Bureau Announces Optional Procedures with Respect to Pending Pre-May 15 Benchmark Cases*, DA 94-1556 (Dec. 29, 1994).

13. IT IS FURTHER ORDERED, pursuant to Section 76.961 of the Commission's Rules, 47 C.F.R. § 76.961, that Viacom Cable shall refund to subscribers that portion of the amounts paid for cable programming service for the period from the filing of the first valid x complaint in each franchise area (as set forth on Appendix A)[18] to May 14, 1994 which exceeded the maximum price for each franchise area set forth in Appendix B (plus franchise fee) per month and was thus unreasonable, plus interest to the date of the refund.

14. IT IS FURTHER ORDERED that Viacom Cable shall promptly determine the overcharges to CPS subscribers for the stated periods, and shall within 30 days of the release of this Order file a report with the Chief, Cable Services Bureau, stating the cumulative refund amount so determined (including franchise fees and interest), describing the calculation thereof, and describing its plan to implement the refund within 60 days of Commission approval thereof.

15. IT IS FURTHER ORDERED, pursuant to Section 76.922(b)(4)(C) of the Commission's rules, 47 C.F.R. § 76.922(b)(4)(C), that Viacom Cable shall, within 30 days of the release of this Order, revise its Form 1200 filings with respect to Red Bluff, California, CUID No. CA0093, and Tehama County-Red Bluff, California, CUID No. CA0094, for the period beginning May 15, 1994, to reduce the monthly charge per tier as of March 31, 1994 for Tier 2 (Line A6b) to equal the maximum price in each franchise area set forth in Appendix B (plus franchise fee).

16. IT IS FURTHER ORDERED that Viacom Cable shall place into effect, within 30 days after its submission of the revised Form 1200 filings required above, prices that reflect the reductions in the CPS rates determined in this Order.

17. IT IS FURTHER ORDERED, pursuant to Section 76.960 of the Commission's rules, 47 C.F.R. § 76.960, that Viacom Cable shall not be required to obtain advance Commission approval of adjustments to its CPS prices for one year following the release of this Order.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

Appendix A

CUID No.	Date First Complaint Filed with FCC	Date Complaint Served
0093	11/22/93	11/18/93
0094	11/24/93	11/18/93

Appendix B

CUID No.	Actual Rates	Maximum Reasonable Rates
0093	$11.84	$11.65
0094	$11.84	$11.74

[18] Our jurisdiction to order a refund dates from the earliest date a valid complaint is filed with the Commission. 47 C.F.R. § 76.961(b).

Before the
Federal Communications Commission
Washington, D.C. 20554

CORRECTED

In the Matter of

Withdrawal of	MI0733 Village of Middleville
FCC Form 329	MI0677 Plainfield Charter Township
Rate Complaints	MI0487 Charter Township of Allendale
Against C-TEC	MI1341 Gaines Charter Township
Cable Systems	
Withdrawal of	MI1089 Grass Lake Township
FCC Form 329	MI0493 Village of Fowlerville
Rate Complaints	MI1062 City of Laingsburg
Against Horizon	
Cable I L.P.	

MEMORANDUM OPINION AND ORDER

Adopted: February 14, 1995; Released: February 21, 1995

By the Deputy Chief, Cable Services Bureau.

1. In each of the cases noted above, the local franchising authority (LFA) filed a complaint with this Commission alleging that the prices charged by C-TEC Cable Systems (C-TEC) for cable programming service tier (CPS) services in its community were unreasonably high. These complaints, and the local franchising authorities and filing dates, are noted at Attachment A. Subsequently, these LFAs wrote to the Commission to withdraw their CPS complaints.[1] In each case, the LFA was the only complainant who filed with this Commission in this community. Our jurisdiction to regulate CPS rates arises with the filing of a valid complaint against those rates. We will allow the withdrawal of these complaints, and our review of these filings will therefore be terminated.

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.

3. The Commission's original rate regulations took effect on September 1, 1993.[5] The Commission subsequently revised its rate regulations effective May 15, 1994.[6] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[7] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[8] In each case captioned above, C-TEC did file either an FCC Form 393 benchmark rate justification submission, or a cost of service rate justification submission.

4. This Commission has now received from each of the captioned local franchising authorities a letter stating that it wished to withdraw its CPS rate complaint against C-TEC. Under our rules, this Commission's authority to regulate CPS cable rates arises when a valid complaint against those rates is filed. In every case noted here, the LFA is the only complainant against this operator in this community. Our mandate is to "protect subscribers of any cable system that is not subject to effective competition from rates that exceed the rates that would be charged if such a system were subject to effective competition."[9] While our rules forbid collusive agreements between operators and local franchising authorities regarding forebearance from rate regulation, there is no evidence of such an agreement here. In many of these letters, in fact, the LFA states that it has completed a rate review of the basic rates, and has found them reasonable. It is on the basis of this finding of reasonableness, rather than on the basis of an underlying agreement to forebear, that these LFAs are seeking to withdraw their CPS rate complaints. We will accordingly allow these complainants to withdraw their complaints. Because our review of the rate justification showings is predicated on the existence of a rate complaint, and because in every case listed here, the operator no longer faces a rate complaint, we are terminating our review of those filings.

5. Accordingly, IT IS ORDERED that permission to withdraw the FCC Form 329 rate complaints against cable programming service rates in the above-noted communities IS GRANTED, and the review of the resulting rate justification filings IS TERMINATED.

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[1] The dates of all withdrawal letters are noted in Attachment A.

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993) (Cable Act of 1992).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] Order in MM Docket No. 92-266, Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[6] *See* Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, MM Docket No. 92-266, Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, 9 FCC Rcd 4119 (1994) (*Benchmark Order*); 47 C.F.R. § 76.922(b).

[7] *See Benchmark Order*, 9 FCC Rcd at 4190, paras. 150-152.

[8] *Id.*

[9] Conference Report on the Cable Act of 1992, at 62. *See also*, Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, MM Docket No. 92-266, Report and Order and Further Notice of Proposed Rulemaking, 8 FCC Rcd 5631 (1993) (*Rate Order*) at 5669.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Deputy Chief, Cable Services Bureau

Attachment A

C-TEC CPS Complaint Withdrawals

CUID No., Local Franchising Authority	Complaints Filed[10]	Complaints Withdrawn
MI0733 Village of Middleville	10/08/93	12/08/94
MI0677 Plainfield Ch. of Township	12/22/93	11/09/94
MI0487 Ch. Township Allendale	11/11/93	11/04/94
MI1341 Gaines Charter Township	10/29/93	01/20/95

Horizon CPS Complaint Withdrawals

MI0493 Village of Fowlerville	02/25/94	10/31/94
MI1062 City of Laingsburg	11/30/93	11/04/94
MI1089 Grass Lake Township	10/22/93	11/01/94

[10] The date given is the date the LFA first filed a complaint. In some cases, the LFAs filed duplicate complaints at later dates.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Kansas City Cable Partners dba American Cablevision Kansas City, Missouri — CUID Nos. MO0198, MO0199, and MO0200

Benchmark Filing To Support
Cable Programming Service Price

MEMORANDUM OPINION AND ORDER

Adopted: February 21, 1995; Released: February 23, 1995

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. Here we consider complaints about the price Kansas City Cable Partners dba American Cablevision ("Cablevision") was charging for its cable programming service ("CPS") tier in Kansas City, Missouri, CUID Nos. MO0198, MO0199 and MO0200. Cablevision has attempted to justify its price through a benchmark showing on FCC Form 393. This Order addresses the reasonableness of Cablevision's price only through May 14, 1994. At a later time we will issue a separate order addressing the reasonableness of the price after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

II. PROCEDURAL MATTERS

4. The first valid CPS complaints were completed and served by the City of Kansas City on Cablevision on October 8, 1993. The Commission received the complaints on October 12, 1993.

5. Cablevision attempted to justify its CPS price through an FCC Form 393 filed on November 16, 1993.

III. DISCUSSION

6. Cablevision claims that its monthly CPS tier price of $13.09 per subscriber is justified by its benchmark filing, which shows a maximum permitted charge of $13.15. However, upon review we have determined that Cablevision has not correctly calculated its maximum permitted price, and it is appropriate to make the following adjustment to Cablevision's calculations in the Form 393:

a. In its Form 393 filing, Cablevision calculated the Inflation Adjustment Factor (Line 127, Worksheet 1, Part II) as of the end of October 1993. However, the figures Cablevision used are not consistent with data on which it should have relied in calculating the Inflation Adjustment Factor. Cablevision used the Gross National Product Price Index ("GNP-PI") data released by the U.S. Department of Commerce on August 31, 1993 to complete Lines 122 and 125, but used an outdated GNP-PI of 121.8 for the third quarter of 1992 in calculating Line 123. The GNP-PI

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[1] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Cablevision has sought to take advantage of the refund deferral period under the *Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking*, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (1994) (*"Second Order on Reconsideration"*), the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which Cablevision implemented its CPS price under the new regulations. *See* para. 3, *infra*. Furthermore, to the extent that the price for the period ending May 14, 1994 is found to be excessive, reductions in Cablevision's price for the period after May 14, 1994 may be required to reflect the fact that Cablevision's price during the earlier period, which is used as the starting point to calculate its price for the prospective period, was unreasonable. *See* 47 C.F.R. § 76.922(b)(4)(C).

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] *Order* in MM Docket No. 92-266, *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

figure for the third quarter of 1992 released on August 31, 1993 was 122.5. Cablevision's calculation of the Inflation Adjustment Factor is thus incorrect.

b. We must therefore recalculate the Inflation Adjustment Factor on the basis of the most accurate data currently available for the date for which Cablevision filed.[11] On July 29, 1994, the U.S. Department of Commerce released corrected inflation data including GNP-PI figures of 122.3 for the third quarter of 1992 and 125.7 for the third quarter of 1993. Using these GNP-PI figures, we calculate 1.030 as the Inflation Adjustment Factor through October 1993, the base date Cablevision used in justifying its rates.

7. This adjustment has the effect of reducing the maximum permitted monthly price for the CPS tier from $13.15 to $12.89.

IV. CONCLUSIONS

8. Upon review of the record herein, we conclude that Cablevision's showing supports a maximum reasonable CPS tier price of $12.89 per month (plus franchise fee) for the period of October 12, 1993 to May 14, 1994 for CUID Nos. MO0198, MO0199 and MO0200.[12] We further determine that we will order appropriate refunds pursuant to Section 76.957 of the Commission's Rules, 47 C.F.R. § 76.957, in order to reimburse subscribers for the amount they paid in excess of a reasonable price.

9. We further conclude that Cablevision must reflect in its Form 1200 rate filing for the period after May 14, 1994 the fact that Cablevision's prices during the earlier period was unreasonable.[13] We reserve the right to make further adjustments to Cablevision's price for the period after May 14, 1994, upon completion of our review of Cablevision's FCC Form 1200 rate filing.

10. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the October 12, 1993 complaints against the cable programming service price charged by Kansas City Cable Partners dba American Cablevision in Kansas City, Missouri, CUID Nos. MO0198, MO0199 and MO0200, and all other complaints relating to the same price, ARE GRANTED TO THE EXTENT INDICATED HEREIN.

11. IT IS FURTHER ORDERED that the benchmark filings submitted by Kansas City Cable Partners dba American Cablevision with respect to Kansas City, Missouri, CUID Nos. MO0198, MO0199 and MO0200, for the period of October 12, 1993 to May 14, 1994, justify a maximum price of $12.89 per month (plus franchise fee) for American Cablevision's cable programming service tier.

12. IT IS FURTHER ORDERED, pursuant to Section 76.961 of the Commission's Rules, 47 C.F.R. § 76.961, that Kansas City Cable Partners dba American Cablevision Cable shall refund to subscribers that portion of the amounts paid for cable programming service from October 12, 1993[14] to May 14, 1994 in Kansas City, Missouri, CUID Nos. MO0198, MO0199 and MO0200, that exceeded $12.89 per month (plus franchise fee), and was thus unreasonable, plus interest to the date of the refund.

13. IT IS FURTHER ORDERED that Kansas City Cable Partners dba American Cablevision shall promptly determine the overcharges to CPS subscribers for the stated period, and shall within 30 days of the release of this Order file a report with the Chief, Cable Services Bureau, stating the cumulative refund amount so determined (including franchise fees and interest), describing the calculation thereof, and describing its plan to implement the refunds within 60 days of Commission approval thereof.

14. IT IS FURTHER ORDERED, pursuant to Section 76.922(b)(4)(C) of the Commission's rules, 47 C.F.R. § 76.922(b)(4)(C), that Kansas City Cable Partners dba American Cablevision shall, within 30 days of the release of this Order, revise its Form 1200 filing with respect to Kansas City, Missouri, CUID Nos. MO0198, MO0199 and MO0200, for the period beginning May 15, 1994, to reduce the monthly charge per tier as of March 31, 1994 for Tier 2 (Line A6b) to equal the maximum price for those franchise areas (plus franchise fee).

15. IT IS FURTHER ORDERED that Kansas City Cable Partners dba American Cablevision shall place into effect, within 30 days after its submission of the revised Form 1200 filing required above, a CPS tier price for Kansas City, Missouri, CUID Nos. MO0198, MO0199 and MO0200, that reflects the reduction in the CPS rate determined in this Order.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

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[11] *See* 47 C.F.R. §76.922(b)(9)(iii) (if a cable operator fails to justify its rates, rates ust be adjusted in accordance with the most accurate data available at the time of analysis).

[12] This finding is based solely on the representations of Cablevision listed in paragraph 5, *supra*, and the modification described in paragraph 6, *supra*. Should information come to our attention that these representations (including representations as to data regarding installations and customer equipment) were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

[13] We reviewed Cablevision's Form 1200 rate filing and confirmed that Cablevision calculated its rates for the period after May 14, 1994 using the rate that we find in this Order to be unreasonable.

[14] Our jurisdiction to order a refund dates from the earliest date a valid complaint is filed with the Commission. 47 C.F.R. § 76.961(b).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Kansas City Cable Partners dba American Cablevision Kansas City, Missouri — CUID Nos. MO0070 and MO0126

Benchmark Filings To Support Cable Programming Service Prices

MEMORANDUM OPINION AND ORDER

Adopted: February 21, 1995; Released: February 23, 1995

By the Deputy Chief, Cable Services Bureau:

I. INTRODUCTION

1. Here we consider complaints about the price Kansas City Cable Partners dba American Cablevision ("Cablevision") was charging for its cable programming service ("CPS") tier in Kansas City, Missouri, CUID Nos. MO0070 and MO0126. Cablevision has attempted to justify its price through a benchmark showing on FCC Form 393. This Order addresses the reasonableness of Cablevision's price only through May 14, 1994. At a later time we will issue a separate order addressing the reasonableness of the price after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filingof a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

II. PROCEDURAL MATTERS

4. The first complete and timely CPS complaints were served on Cablevision on February 24, 1994 for CUID No. MO0070 and on February 26, 1994 for CUID No. MO0126. The Commission received the complaints on February 28, 1994.

5. Cablevision attempted to justify its CPS price through FCC Forms 393 filed on March 22, 1994.

III. DISCUSSION

6. Cablevision asserts that its monthly CPS tier price of $13.09 per subscriber is justified by its benchmark filing because its price is equal to the maximum permitted charge of $13.09 as calculated in the filing. Upon review of Cablevision's Form 393, we have found no apparent errors that would result in Cablevision's CPS tier price exceeding its maximum permitted price.

IV. CONCLUSIONS

7. Upon review of the record herein, we conclude that Cablevision's showing supports a CPS tier price of $13.09 per month (plus franchise fee) for the period of February 28, 1994 to May 14, 1994.[11]

8. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the February 24, 1994 complaint for CUID MO0070 and the February 26, 1994 complaint for CUID No. MO0126 against the cable programming service price charged by

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[1] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Cablevision has sought to take advantage of the refund deferral period under the *Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking*, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (1994) (*"Second Order on Reconsideration"*), the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which Cablevision implemented its CPS price under the new regulations. *See* para. 3, *infra*.

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] *Order* in MM Docket No. 92-266, *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[11] This finding is based solely on the representations of Cablevision listed in paragraph 5, *supra*. Should information come to our attention that these representations (including representations as to data regarding installations and customer equipment) were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

Kansas City Cable Partners dba American Cablevision in Kansas City, Missouri, ARE DENIED TO THE EXTENT INDICATED HEREIN.

9. IT IS FURTHER ORDERED that the benchmark filing submitted by Kansas City Cable Partners dba American Cablevision with respect to CUID Nos. MO0070 and MO0126 for the period of February 28, 1994 to May 14, 1994, justify a price of $13.09 per month (plus franchise fee) for American Cablevision's cable programming service tier.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Deputy Chief, Cable Services Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Cablevision of Central Florida, A Division of Time Warner Cable Lecanto, Florida System — CUID Nos. FL0843 and FL0026

Benchmark Filings To Support Cable Programming Service Price

MEMORANDUM OPINION AND ORDER

Adopted: February 21, 1995; Released: February 23, 1995

By the Deputy Chief, Cable Services Bureau:

I. INTRODUCTION

1. Here we consider complaints about the price Time Warner Cable ("Time Warner") was charging for its cable programming service ("CPS") tier in the communities designated by CUID No. FL0843 and its predecessors and CUID No. FL0026, served through Time Warner's Lecanto, Florida, system.[1] Time Warner has chosen to attempt to justify its price through benchmark showings on FCC Form 393. This Order addresses the reasonableness of Time Warner's price only through May 14, 1994. At a later date we will issue a separate order addressing the reasonableness of the price after that date.[2]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[3] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[4] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[5] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[6]

3. The Commission's original rate regulations took effect on September 1, 1993.[7] The Commission subsequently revised its rate regulations effective May 15, 1994.[8] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[9] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[10] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[11]

II. PROCEDURAL MATTERS

4. The first complete and timely CPS complaint was completed and served on Time Warner on September 22, 1993 for CUID No. FL0843 and October 12, 1993 for CUID No. FL0026. The Commission received these complaints on September 28, 1993, and October 18, 1993, respectively.

5. Time Warner attempted to justify its CPS price through an FCC Form 393 filed on November 16, 1993 in response to the first complete and timely complaint. It subsequently filed substantially identical Form 393s in response to other complaints. Time Warner amended its justification on June 23, 1994 in response to a Cable Services Bureau Order citing common deficiencies observed in benchmark filings generally.[12]

III. DISCUSSION

6. Time Warner asserts that its monthly CPS tier price of $10.64 per subscriber is justified by its benchmark filings because its price is less than the maximum permitted charge of $10.77 as calculated in the filings. Upon review of Time Warner's Form 393, we have found no apparent errors that would result in Time Warner's CPS tier price exceeding its maximum permitted price.

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[1] On June 27, 1994, CUID Nos. FL0025, FL0332, FL0359, FL0360, FL0361, FL0812, FL0843, FL0944, FL0945, FL0954, FL0955, FL0956, FL0957, FL0958, FL0959, FL1001, FL1002, FL1003, FL1004 and FL1005 were merged into CUID No. FL0843. *See* Letter from FCC to Linda Mitchell, Time Warner Entertainment Company, L.P. dated June 27, 1994. According to the best information available to the Commission, all of these CUID areas constituted a single franchise area throughout the time period covered by this Order. Thus, the Commission's receipt of a valid complaint from a subscriber living in any one of these CUID areas gives the Commission jurisdiction over Time Warner's price for the CPS tier throughout the franchise area. *See* 47 C.F.R. §984(a) (prices must be uniform throughout a franchise area).

[2] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Time Warner has sought to take advantage of the refund deferral period under the *Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking*, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (1994) ("*Second Order on Reconsideration*"), the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which Time Warner implemented its CPS price under the new regulations. *See* para. 3, *infra*.

[3] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[4] 47 C.F.R. § 76.956.

[5] 47 C.F.R. § 76.956(b).

[6] *Id.*

[7] *Order* in MM Docket No. 92-266, *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[8] 47 C.F.R. § 76.922(b).

[9] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[10] *Id.*

[11] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[12] *Cable Operators' Rate Justification Filings*, DA 94-526, 9 FCC Rcd 7752 (Cab. Serv. Bur. 1994).

IV. CONCLUSIONS

7. Upon review of the record herein, we conclude that Time Warner's showing supports a CPS tier price of $10.64 per month (plus franchise fee) for the period of September 28, 1993 to May 14, 1994.[13]

8. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the September 22, 1993 complaint against the cable programming service price charged by Time Warner Cable in the Lecanto, Florida systemfor CUID No. FL0843 and its predecessors, and the October 12, 1993 complaint against the cable programming service price charged by Time Warner Cable in Crystal River, Florida, CUID NO. FL0026, and all other complaints in these franchise areas relating to the same price, ARE DENIED TO THE EXTENT INDICATED HEREIN.

9. IT IS FURTHER ORDERED that the benchmark filing submitted by Time Warner Cable with respect to CUID Nos. FL0843 and FL0026 and their predecessors for the period of September 28, 1993 to May 14, 1994, justifies a price of $10.64 per month (plus franchise fee) for Time Warner Cable's cable programming service tier.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Deputy Chief, Cable Services Bureau

[13] This finding is based solely on the representations of Time Warner listed in paragraph 5, *supra*. Should information come to our attention that these representations (including representations as to data regarding installations and customer equipment) were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Time Warner Cable CUID No. NC0011
Greensboro, North Carolina

Benchmark Filing To Support
Cable Programming Service Price

MEMORANDUM OPINION AND ORDER

Adopted: February 21, 1995; Released: February 23, 1995

By the Deputy Chief, Cable Services Bureau:

I. INTRODUCTION

1. Here we consider a complaint about the price Time Warner Cable ("Time Warner") was charging for its cable programming service ("CPS") tier in Greensboro, North Carolina, CUID No. NC0011. Time Warner has attempted to justify its price through a benchmark showing on FCC Form 393. This Order addresses the reasonableness of Time Warner's price only through May 14, 1994. At a later time we will issue a separate order addressing the reasonableness of the price after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

II. PROCEDURAL MATTERS

4. The first valid CPS complaint was completed and served on Time Warner on January 31, 1994. The Commission received the complaint on February 4, 1994.

5. Time Warner attempted to justify its CPS price through an FCC Form 393 filed on February 28, 1994.

III. DISCUSSION

6. Time Warner asserts that its monthly CPS tier price of $13.75 per subscriber is justified by its benchmark filing because its price is less than the maximum permitted charge of $14.97 as calculated in the filing. Upon review of Time Warner's Form 393, we have found no apparent errors that would result in Time Warner's CPS tier price exceeding its maximum permitted price.

IV. CONCLUSIONS

7. Upon review of the record herein, we conclude that Time Warner's showing supports a CPS tier price of $13.75 per month (plus franchise fee) for the period of February 4, 1994 to May 14, 1994 in CUID No. NC0011.[11]

8. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the January 31, 1994 complaint against the cable programming service price charged by Time Warner Cable in Greensboro, North Carolina, CUID No. NC0011, and all other complaints relating to the same price, ARE DENIED TO THE EXTENT INDICATED HEREIN.

9. IT IS FURTHER ORDERED that the benchmark filing submitted by Time Warner Cable with respect to CUID No. NC0011, for the period of February 4, 1994 to

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[1] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Prime Cable has sought to take advantage of the refund deferral period under the *Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking*, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (1994) (*"Second Order on Reconsideration"*), the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which Time Warner implemented its CPS price under the new regulations. *See* para. 3, *infra*.

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] *Order* in MM Docket No. 92-266, *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[11] This finding is based solely on the representations of Time Warner listed in paragraph 5, *supra*. Should information come to our attention that these representations (including representations as to data regarding installations and customer equipment) were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

May 14, 1994, justifies a price of $13.75 per month (plus franchise fee) for Time Warner Cable's cable programming service tier.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Deputy Chief, Cable Services Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Time Warner Cable Raleigh, North Carolina	CUID Nos. NC0028 and NC0512

Benchmark Filing To Support
Cable Programming Service Price

MEMORANDUM OPINION AND ORDER

Adopted: February 21, 1995; Released: February 23, 1995

By the Deputy Chief, Cable Services Bureau:

I. INTRODUCTION

1. Here we consider complaints about the price Time Warner Cable ("Time Warner") was charging for its cable programming service ("CPS") tier in Raleigh, North Carolina, CUID Nos. NC0028 and NC0512. Time Warner has attempted to justify its price through a benchmark showing on FCC Form 393. This Order addresses the reasonableness of Time Warner's price only through May 14, 1994. At a later time we will issue a separate order addressing the reasonableness of the price after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

II. PROCEDURAL MATTERS

4. The first valid CPS complaints were completed and served on Time Warner on September 20, 1993. The Commission received the complaints on September 23, 1993.

5. Time Warner attempted to justify its CPS price through an FCC Form 393 filed on November 15, 1993. Time Warner amended its justification on June 24, 1994 in response to a Cable Services Bureau Order citing common deficiencies observed in benchmark filings generally.[11]

III. DISCUSSION

6. Time Warner asserts that its monthly CPS tier price of $11.93 per subscriber is justified by its benchmark filing because its price is equal to the maximum permitted charge of $11.93 as calculated in the filing. Upon review of Time Warner's Form 393, we have found no apparent errors that would result in Time Warner's CPS tier price exceeding its maximum permitted price.

IV. CONCLUSIONS

7. Upon review of the record herein, we conclude that Time Warner's showing supports a CPS tier price of $11.93 per month (plus franchise fee) for the period of September 23, 1993 to May 14, 1994 in CUID Nos. NC0028 and NC0512.[12]

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[1] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Prime Cable has sought to take advantage of the refund deferral period under the *Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking*, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (1994) (*"Second Order on Reconsideration"*), the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which Time Warner implemented its CPS price under the new regulations. *See* para. 3, *infra*.

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] *Order* in MM Docket No. 92-266, *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[11] *Cable Operators' Rate Justification Filings*, DA 94-526, 9 FCC Rcd 7752 (Cab. Serv. Bur. 1994).

[12] This finding is based solely on the representations of Time Warner listed in paragraph 5, *supra*. Should information come to our attention that these representations (including representations as to data regarding installations and customer equipment) were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

8. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the September 20, 1993 complaints against the cable programming service price charged by Time Warner Cable in Raleigh, North Carolina, CUID Nos. NC0028 and NC0512, and all other complaints relating to the same price, ARE DENIED TO THE EXTENT INDICATED HEREIN.

9. IT IS FURTHER ORDERED that the benchmark filing submitted by Time Warner Cable with respect to CUID Nos. NC0028 and NC0512, for the period of September 23, 1994 to May 14, 1994, justifies a price of $11.93 per month (plus franchise fee) for Time Warner Cable's cable programming service tier.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Deputy Chief, Cable Services Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Kansas City Cable Partners dba American Cablevision Kansas City, Kansas	CUID Nos. KS0045 and KS0078

Benchmark Filings To Support
Cable Programming Service Prices

MEMORANDUM OPINION AND ORDER

Adopted: February 21, 1995; Released: February 23, 1995

By the Deputy Chief, Cable Services Bureau:

I. INTRODUCTION

1. Here we consider complaints about the prices Kansas City Cable Partners dba American Cablevision ("Cablevision") was charging for its cable programming service ("CPS") tier in Kansas City, Kansas, CUID Nos. KS0045 and KS0078. Cablevision has attempted to justify its prices through benchmark showings on FCC Form 393. This Order addresses the reasonableness of Cablevision's prices only through May 14, 1994. At a later time we will issue a separate order addressing the reasonableness of the price after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

II. PROCEDURAL MATTERS

4. The first valid CPS complaints for both franchise areas were completed and served on Cablevision on January 25, 1994. The Commission received the complaints on that same date.

5. Cablevision attempted to justify its CPS prices through FCC Forms 393 filed on February 16, 1994. Cablevision amended its justification for CUID Nos. KS0045 and KS0078 on July 5, 1994, in response to a Cable Services Bureau Order citing common deficiencies observed in benchmark filings generally.[11]

III. DISCUSSION

6. Cablevision asserts that for CUID No. KS0045, its monthly CPS tier price of $11.24 per subscriber is justified by its benchmark filing because it is equal to the maximum permitted charge of $11.24 as calculated in the filing. Cablevision further asserts that for CUID No. KS0078, its monthly CPS tier price of $13.74 per suscriber is justified by its benchmark filing because it is less than the maximum permitted charge of $13.76 as calculated in the filing. Upon review of Cablevision's Form 393, we have found no apparent errors that would result in Cablevision's CPS tier price exceeding its maximum permitted price.

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[1] The findings in this Order do not in any way prejudge the reasonableness of the prices for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Cablevision has sought to take advantage of the refund deferral period under the *Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking*, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (1994) (*"Second Order on Reconsideration"*), the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which Cablevision implemented its CPS prices under the new regulations. *See* para. 3, *infra*.

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] *Order* in MM Docket No. 92-266, *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[11] *Cable Operators' Rate Justification Filings*, DA 94-526, 9 FCC Rcd 7752 (Cab. Serv. Bur. 1994).

IV. CONCLUSIONS

7. Upon review of the record herein, we conclude that Cablevision's showing supports a CPS tier price of $11.24 per month (plus franchise fee) for the period of January 25, 1994 to May 14, 1994 in CUID No. KS0045, and $13.74 per month (plus franchise fee) for the period of January 25, 1994 to May 14, 1994 in CUID No. KS0078.[12]

8. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the January 25, 1994 complaints against the cable programming service prices charged by Kansas City Cable Partners dba American Cablevision in Kansas City, Kansas, CUID Nos. KS0045 and KS0078, and all other complaints relating to the same prices, ARE DENIED TO THE EXTENT INDICATED HEREIN.

9. IT IS FURTHER ORDERED that the benchmark filings submitted by Kansas City Cable Partners dba American Cablevision for the period of January 25, 1994 to May 14, 1994, justifies a price of $11.24 per month (plus franchise fee) for American Cablevision's cable programming service tier in CUID No. KS0045 and $13.74 per month (plus franchise fee) for American Cablevision's cable programming service tier in CUID No. KS0078.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Deputy Chief, Cable Services Bureau

[12] These findings are based solely on the representations of Cablevision listed in paragraph 5, *supra*. Should information come to our attention that these representations (including representations as to data regarding installations and customer equipment) were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Time Warner Cable Champaign-Urbana, Illinois	CUID Nos. IL0189 and IL0190

Benchmark Filing To Support
Cable Programming Service Price

MEMORANDUM OPINION AND ORDER

Adopted: February 21, 1995; Released: February 23, 1995

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. Here we consider complaints about the price Time Warner Cable of Champaign-Urbana, Illinois ("Time Warner") was charging for its cable programming service ("CPS") tier in Champaign, Illinois, CUID No. IL0189 and Urbana, Illinois, CUID No. IL0190. Time Warner has chosen to attempt to justify its price through a benchmark showing on FCC Form 393. This order addresses the reasonableness of Time Warner's price only through May 14, 1994. At a later time we will issue a separate order addressing the reasonableness of the price after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994, forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994, through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994, through a benchmark showing, operators must use the FCC Form 1200 series.[10]

II. PROCEDURAL MATTERS

4. The first valid CPS complaint for the City of Champaign, CUID No. IL0189, was served on Time Warner on December 10, 1993. The first valid CPS complaint for the City of Urbana, CUID No. IL0190, was served on Time Warner on November 19, 1993.[11] The Commission received the complaints on December 15, 1993 for CUID No. IL0189 and on November 22, 1993 for CUID No. IL0190.

5. Time Warner filed substantially identical Form 393s on December 21, 1993 for CUID No. IL0189 and on December 6, 1993 for CUID No. IL0190. Time Warner amended its justification for CUID No. IL0189 on June 22, 1994, in response to a Cable Services Bureau Order citing common deficiencies observed in benchmark filings generally.[12]

III. DISCUSSION

6. Time Warner claims that its monthly CPS tier price of $12.25 per subscriber is justified by its benchmark filings, which show a maximum permitted charge of $12.27. However, upon review we have determined that Time Warner has not correctly calculated its maximum permitted price, and it is appropriate to make the following adjustments to Time Warner's calculations in the Form 393s:

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[1] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Time Warner has sought to take advantage of the refund deferral period under the *Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking,* MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (1994) (*"Second Order on Reconsideration"),* the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which Time Warner implemented its CPS price under the new regulations. *See* para. 3, *infra.*Furthermore, to the extent that the price for the period ending May 14, 1994 is found to be excessive, reductions in Time Warner's price for the period after May 14, 1994 may be required to reflect the fact that Time Warner's price during the earlier period, which is used as the starting point to calculate its price for the prospective period, was unreasonable. *See* 47 C.F.R. §76.922(b)(4)(c).

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended,* 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] *Order* in MM Docket No. 92-266, *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation,* FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration* at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration* at 4189 n.195.

[11] The complaints were dated December 10, 1993 for CUID No. IL0189 and November 19, 1993 for CUID No. IL0190, and state that they were mailed to Time Warner on those dates. Time Warner has not complied with 47 C.F.R. § 76.956(a), which requires it to state when service occurred. Under these circumstances we will consider December 10, 1993 and November 19, 1993 as the service dates.

[12] *Cable Operators' Rate Justification Filings,* DA 94-526, 9 FCC Rcd 7752 (Cab. Serv. Bur. 1994).

a. In its most recent Form 393 filings, Time Warner calculated the Inflation Adjustment Factor (Line 127, Worksheet 1, Part II) as of the end of September 1993. However, the figures Time Warner used are not consistent with data on which it should have relied in calculating the Inflation Adjustment Factor. Time Warner used the Gross National Product Price Index ("GNP-PI") data released by the U.S. Department of Commerce on August 31, 1993 to complete Lines 122 and 125, but used an outdated GNP-PI of 121.8 for the third quarter of 1992 in calculating Line 123. The GNP-PI figure for the third quarter of 1992 released on August 31, 1993 was 122.5. Time Warner scalculation of the Inflation Adjustment Factor is thus incorrect.

b. We must therefore recalculate the Inflation Adjustment Factor on the basis of the most accurate data currently available for the date for which Time Warner filed.[13] On July 29, 1994, the U.S. Department of Commerce released corrected inflation data including GNP-PI figures of 122.3 for the third quarter of 1992 and 125.7 for the third quarter of 1993. Using these GNP-PI figures, we calculate 1.028 as the Inflation Adjustment Factor through September 1993, the base date Time Warner used in justifying its rates.

7. This adjustment has the effect of reducing the maximum permitted monthly price for the CPS tier from $12.25 to $12.11.

IV. CONCLUSIONS

8. Upon review of the record herein, we conclude that Time Warner's showing supports a maximum reasonable CPS tier price of $12.11 per month (plus franchise fee) for the period of December 15, 1993 to May 14, 1994 for CUID No. IL0189 and for the period of November 22, 1993 to May 14, 1994 for CUID No. IL0190.[14] We further determine that we will order appropriate refunds pursuant to Section 76.957 of the Commission's Rules, 47 C.F.R. § 76.957, in order to reimburse subscribers for the amount they paid in excess of a reasonable price.

9. We further conclude that Time Warner must reflect in its Form 1200 rate filing for the period after May 14, 1994 the fact that Time Warner's prices during the earlier period were unreasonable. We reserve the right to make further adjustments to Time Warner's prices for the period after May 14, 1994, upon completion of our review of Time Warner's FCC Form 1200 rate filing.

10. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the December 15, 1993 complaint against the cable programming service price charged by Time Warner Cable in Champaign, Illinois, CUID No. IL0189, and the November 22, 1993 complaint against the cable programming service price charged by Time Warner in Urbana, Illinois, CUID No. IL0190, and all other complaints in those franchise areas relating to the same price, ARE GRANTED TO THE EXTENT INDICATED HEREIN.

11. IT IS FURTHER ORDERED that the benchmark filings submitted by Time Warner Cable with respect to the City of Champaign, Illinois, CUID No. IL0189, for the period of December 15, 1993 to May 14, 1994, and with respect to the City of Urbana, Illinois, CUID No. IL0190, for the period of November 22, 1993 to May 14, 1994 justify a maximum price of $12.11 per month (plus franchise fee) for Time Warner Cable's cable programming service tier.

12. IT IS FURTHER ORDERED, pursuant to Section 76.961 of the Commission's Rules, 47 C.F.R. § 76.961, that Time Warner Cable shall refund to subscribers that portion of the amounts paid for cable programming service from December 15, 1993 [15] to May 14, 1994 for the City of Champaign, Illinois, CUID No. IL0189, and from November 22, 1993 to May 14, 1994, for the City of Urbana, Illinois, CUID No. IL0190, that exceeded $12.11 per month (plus franchise fee), and was thus unreasonable, plus interest to the date of the refund.

13. IT IS FURTHER ORDERED that Time Warner Cable shall promptly determine the overcharges to CPS subscribers for the stated periods, and shall within 30 days of the release of this Order file a report with the Chief, Cable Services Bureau, stating the cumulative refund amount so determined (including franchise fees and interest), describing the calculation thereof, and describing its plan to implement the refunds within 60 days of Commission approval thereof.

14. IT IS FURTHER ORDERED, pursuant to Section 76.922(b)(4)(C) of the Commission's rules, 47 C.F.R. § 76.922(b)(4)(C), that Time Warner Cable shall, within 30 days of the release of this Order, revise its Form 1200 filings with respect to Champaign, Illinois, CUID No. IL0189, and with respect to Urbana, Illinois, CUID No. IL0190, for the period beginning May 15, 1994, to reduce the monthly charge per tier as of March 31, 1994 for Tier 2 (Line A6b) to equal the maximum price for those franchise areas (plus franchise fee).

15. IT IS FURTHER ORDERED that Time Warner Cable shall place into effect, within 30 days after its submission of the revised Form 1200 filings required above, a CPS tier price for Champaign, Illinois, CUID No. IL0189, and for the City of Urbana, Illinois, CUID No. IL0190, that reflects the reduction in the CPS rate determined in this Order.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

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[13] *See* 47 C.F.R. §76.922(b)(9)(iii) (if a cable operator fails to justify its rates, rates must be adjusted in accordance with the most accurate data available at the time of analysis).

[14] These findings are based solely on the representations of Time Warner listed in paragraph 5, *supra*, and the modification described in paragraph 6, *supra*. Should information come to our attention that these representations (including representations as to data regarding installations and customer equipment) were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

[15] Our jurisdiction to order a refund dates from the earliest date a valid complaint is filed with the Commission.47 C.F.R. § 76.961(b).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Vision Cable of Dubois Dubois, Pennsylvania	CUID No. PA0042 (Dubois, PA)

Benchmark Filing To Support
Cable Programming Service Price

MEMORANDUM OPINION AND ORDER

Adopted: February 21, 1995; Released: February 22, 1995

By the Deputy Chief, Cable Services Bureau:

I. INTRODUCTION

1. Here we consider a complaint about the price Vision Cable of Dubois ("Vision Cable") was charging for its Cable Programming Service ("CPS") Tier in Dubois, Pennsylvania, for CUID No. PA0042. Vision Cable has attempted to justify its price through a benchmark showing on FCC Form 393. This Order addresses the reasonableness of Vision Cable's price only through May 14, 1994. At a later time we will issue a separate order addressing the reasonableness of the price after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

II. PROCEDURAL MATTERS

4. A complete and timely CPS complaint for Dubois, Pennsylvania, CUID No. PA0042, was completed and served on Vision Cable on January 6, 1994 and received by the Commission on January 11, 1994.

5. In response to this complaint, Vision Cable attempted to justify its CPS price through FCC Form 393 filed on January 31, 1994. Vision Cable amended its justification on June 21, 1994 in response to a Cable Services Bureau Order citing common deficiencies observed in benchmark filings generally.[11]

III. DISCUSSION

6. Vision Cable asserts that its monthly CPS tier price of $10.01 per subscriber is justified by its benchmark filing because its price is equal to the maximum permitted charge of $10.01 as calculated in its most recent amended filing dated June 21, 1994. Upon review of Vision Cable's Form 393, we have found no apparent errors that would require a recalculation of Vision Cable's maximum permitted CPS price.

IV. CONCLUSIONS

7. Upon review of the record herein, we conclude that Vision Cable's showing supports a maximum reasonable CPS tier price of $10.01 per month (plus franchise fee) from January 11, 1994 through May 14, 1994.[12]

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[1] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Vision Cable has sought to take advantage of the refund deferral period under the *Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking*, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (1994) (*"Second Order on Reconsideration"*), the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which Vision Cable implemented its CPS price under the new regulations. *See* para. 3, *infra*.

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] *Order* in MM Docket No. 92-266, *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[11] *Cable Operators' Rate Justification Filings*, DA 94-526, 9 FCC Rcd 7752 (Cab. Serv. Bur. 1994).

[12] This finding is based solely on the representations of Vision Cable listed in paragraph 5, *supra*. Should information come to our attention that these representations (including representations as to data regarding installations and customer equipment) were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

8. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the complaint against the cable programming service price charged by Vision Cable of Dubois in Dubois, Pennsylvania, CUID No. PA0042, IS DENIED TO THE EXTENT INDICATED HEREIN.

9. IT IS FURTHER ORDERED that the benchmark filing submitted by Vision Cable of Dubois for CUID No. PA0042 for the period from January 11, 1994 to May 14, 1994 justifies a maximum price of $10.01 per month (plus franchise fee) for Vision Cable of Dubois' Cable Programming Service Tier.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Deputy Chief, Cable Services Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Post-Newsweek Cable	CUID No. AZ0022 IL0613, IL0614, IL1220, IL1243, IL1262 NM0007 OK0012

Benchmark Filings To Support
Cable Programming Service Prices

MEMORANDUM OPINION AND ORDER

Adopted: February 21, 1995; Released: February 22, 1995

By the Deputy Chief, Cable Services Bureau:

I. INTRODUCTION

1. Here we consider complaints about the prices Post-Newsweek Cable ("Post-Newsweek"), through its subsidiary companies as shown on Appendix A, was charging for its Cable Program Service ("CPS") Tier in the communities designated by the CUID numbers referenced above and on Appendix A. Post-Newsweek has attempted to justify its prices through benchmark showings on FCC Form 393. This Order addresses the reasonableness of Post-Newsweek's prices only through May 14, 1994. At a later time we will issue a separate order addressing the reasonableness of the prices after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

II. PROCEDURAL MATTERS

4. The first complete and timely CPS complaint in each of the franchise areas was completed and served on Post-Newsweek and filed with the Commission as set forth in Appendix A.

5. Post-Newsweek attempted to justify its CPS prices through Forms 393 filed on the dates set forth on Appendix B.

III. DISCUSSION

6. Post-Newsweek asserts that its monthly CPS tier prices per subscriber are justified by its benchmark filings because its actual prices (as shown on Appendix C) are equal to or below the maximum permitted charges as calculated in its filings. Upon review of Post-Newsweek's Forms 393, we have found no apparent errors that would require a recalculation of Post-Newsweek's maximum permitted CPS prices.

IV. CONCLUSIONS

7. Upon review of the record herein, we conclude that Post-Newsweek has demonstrated that its CPS tier prices as shown on Appendix C (plus franchise fee) were equal to or below the maximum permitted prices for the CPS tier for the period from the filing of the earliest complaint in each franchise area (as shown on Appendix A) to May 14, 1994.[11]

8. IT IS ACCORDINGLY ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the complaints referenced on Appendix A against the cable programming service prices charged by Post-

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[1] The findings in this Order do not in any way prejudge the reasonableness of the prices for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Post-Newsweek has sought to take advantage of the refund deferral period under the *Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking*, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (1994) (*"Second Order on Reconsideration"*), the maximum permitted CPS prices determined herein might also apply from May 15, 1994 until the date on which Post-Newsweek implemented its CPS prices under the new regulations. *See* para. 3, *infra*.

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] *Order* in MM Docket No. 92-266, *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[11] These findings are based solely on the representations of Post-Newsweek listed in paragraph 5, *supra*. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This

Newsweek Cable and its subsidiary companies, and all other complaints in the same franchise areas relating to the same prices, ARE DENIED TO THE EXTENT INDICATED HEREIN.

9. IT IS FURTHER ORDERED that the benchmark filings submitted by Post-Newsweek Cable and its subsidiary companies (as shown on Appendix B) with respect to the franchise areas referenced in Appendix A for the period from the filing of the earliest complaint in each franchise area (as shown on Appendix A) to May 14, 1994, justify the prices shown on Appendix C (plus franchise fee) for Post-Newsweek Cable's Cable Programming Service Tier.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Deputy Chief, Cable Services Bureau

Appendix A

First Valid 329s Filed with the FCC

Post-Newsweek of Arizona - system 006627

CUID No.	Date First Complaint Filed with FCC	Date Complaint Served
AZ0022	10-15-93	10-12-93

Post-Newsweek of Illinois - system 005882

CUID No.	Date First Complaint Filed with FCC	Date Complaint Served
IL0613	10-14-93	10-08-93
IL0614	09-24-93	09-18-93
IL1220	12-22-93	12-09-93
IL1243	10-26-93	10-22-93
IL1262	11-03-93	10-01-93

Post-Newsweek of New Mexico - system 001959

CUID No.	Date First Complaint Filed with FCC	Date Complaint Served
NM0007	11-03-93	11-01-93

Post-Newsweek of Oklahoma - system 001920

CUID No.	Date First Complaint Filed with FCC	Date Complaint Served
OK0012	09-29-93	09-23-93

Appendix B

Initial and Amended Form 393 Filings

Post-Newsweek of Arizona - system 006627

CUID No.	Initial Form 393 Filing	Amended Form 393 Filing(s)
AZ0022	11-15-93	No amendment filed

Post-Newsweek of Illinois - system 005882

CUID No.	Initial Form 393 Filing	Amended Form 393 Filing(s)
IL0613	11-15-93	no amended 393 on file
IL0641	11-15-93	no amended 393 on file
IL1220	01-07-94	no amended 393 on file
IL1243	11-19-93	no amended 393 on file
IL1262	11-15-93	no amended 393 on file

Post-Newsweek of New Mexico - system 001959

CUID No.	Initial Form 393 Filing	Amended Form 393 Filing(s)
NM0007	11-15-93	no amended 393 on file

Post-Newsweek of Oklahoma - system 001920

CUID No.	Initial Form 393 Filing	Amended Form 393 Filing(s)
OK0012	11-15-93	no amended 393 on file

Appendix C

Maximum Permitted Rates

Post-Newsweek of Arizona - system 006627

CUID No.	Cable Service
AZ0022	$14.75

Post-Newsweek of Illinois - system 005882

CUID No.	Cable Service
IL0613	$13.86
IL0614	$13.86
IL1220	$13.86
IL1243	$13.86
IL1262	$13.86

Post-Newsweek of New Mexico - system 001959

CUID No.	Cable Service
NM0007	$14.50

Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

Post-Newsweek of Oklahoma - system 001920

CUID No.	Cable Service
OK0012	$12.24

Before the
Federal Communications Commission
Washington, D.C. 20554

In re:

Pulitzer Broadcasting Co. CSR-3971-A
Omaha, Nebraska

For Modification of Station
KETV-TV's ADI

MEMORANDUM OPINION AND ORDER

Adopted: March 23, 1995; Released: March 31, 1995

By the Cable Services Bureau:

INTRODUCTION

1. In the captioned proceeding, Pulitzer Broadcasting Company, licensee of television station KETV (hereinafter "KETV"), Omaha, Nebraska (ABC - channel 7), has requested the Commission to include the Nebraska communities of Lincoln and Crete within the Omaha, Nebraska "area of dominant influence" ("ADI") for the purpose of obtaining signal carriage rights on the cable system serving those communities.[1] On September 7, 1993, television station KHGI (ABC - Channel 13), Kearney, Nebraska, filed an opposition to the petition for special relief. On August 19, 1993, television station KHAS (NBC - Channel 5), Hastings, Nebraska also filed an opposition. On September 20, 1993, KETV filed a consolidated reply to these oppositions. TV Transmission, Inc., d/b/a Lincoln Cablevision filed comments on the petition for special relief on September 29, 1993. On January 7, 1994, television station KCAN-TV (satellite of WCAU-Sioux City, Iowa, an ABC affiliate), Albion, Nebraska, filed a request for leave to submit late-filed comments and its comments. KETV then filed an opposition to the request for leave on January 21, 1994.

BACKGROUND

2. Pursuant to §4 of the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act")[2] and implementing rules adopted by the Commission in its Report and Order in MM Docket No. 92-259,[3] a commercial television broadcast station is entitled to assert mandatory carriage rights on cable systems located within the station's market. A station's market for this purpose is its "area of dominant influence," or ADI, as defined by the Arbitron audience research organization.[4] An ADI is a geographic market designation that defines each television market exclusive of others, based on measured viewing patterns. Essentially, each county in the United States is allocated to a market based on which home-market stations receive a preponderance of total viewing hours in the county. For purposes of this calculation, both over-the-air and cable television viewing are included.[5]

3. Under the Act, however, the Commission is also directed to consider changes in ADI areas. Section 614(h) provides that the Commission may:

> with respect to a particular television broadcast station, include additional communities within its television market or exclude communities from such station's television market to better effectuate the purposes of this section.

In considering such requests, the 1992 Cable Act provides that:

> the Commission shall afford particular attention to the value of localism by taking into account such factors as:
>
> (I) whether the station, or other stations located in the same area, have been historically carried on the cable system or systems within such community;
>
> (II) whether the television station provides coverage or other local service to such community;
>
> (III) whether any other television station that is eligible to be carried by a cable system in such community in fulfillment of the requirements of this section provides news coverage of issues of concern to such community or provides carriage or coverage of sporting and other events of interest to the community; and
>
> (IV) evidence of viewing patterns in cable and noncable households within the areas served by the cable system or systems in such community.

4. The legislative history of this provision indicates that:

> where the presumption in favor of ADI carriage would result in cable subscribers losing access to local stations because they are outside the ADI in which a local cable system operates, the FCC may make an adjustment to include or exclude particular

[1] KETV filed its initial request on July 2, 1993 and filed a supplement to it on October 4, 1993. This filing contained a statement in support of the petition from the Mayor of Lincoln, Nebraska.

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992).

[3] *Broadcast Signal Carriage Issues*, 8 FCC Rcd 2965, 2976-2977 (1993).

[4] Section 4 of the 1992 Cable Act specifies that a commercial broadcasting station's market shall be determined in the manner provided in §73.3555(d)(3)(i) of the Commission's Rules, as in effect on May 1, 1991. This section of the rules, now redesignated §73.3555(e)(3)(i), refers to Arbitron's ADI for purposes of the broadcast multiple ownership rules. Section 76.55(e) of the Commission's Rules provides that the ADIs to be used for purposes of the initial implementation of the mandatory carriage rules are those published in Arbitron's 1991-1992 Television Market Guide.

[5] Certain counties are divided into more than one sampling unit because of the topography involved. Also, in certain circumstances, a station may have its home county assigned to an ADI even though it receives less than a preponderance of the audience in that county. Refer to Arbitron's *Description of Methodology* handbook for a more complete description of how counties are allocated.

communities from a television station's market consistent with Congress' objective to ensure that television stations be carried in the areas which they serve and which form their economic market.

* * * * *

[This subsection] establishes certain criteria which the Commission shall consider in acting on requests to modify the geographic area in which stations have signal carriage rights. These factors are not intended to be exclusive, but may be used to demonstrate that a community is part of a particular station's market.[6]

5. The Commission provided the following guidance in the *Report and Order* to aid decision making in these matters:

For example, the historical carriage of the station could be illustrated by the submission of documents listing the cable system's channel line-up (*e.g.*, rate cards) for a period of years. To show that the station provides coverage or other local service to the cable community (factor 2), parties may demonstrate that the station places at least a Grade B coverage contour over the cable community or is located close to the community in terms of mileage. Coverage of news or other programming of interest to the community could be demonstrated by program logs or other descriptions of local program offerings. The final factor concerns viewing patterns in the cable community in cable *and* non-cable homes. Audience data clearly provide appropriate evidence about this factor. In this regard, we note that surveys such as those used to demonstrate significantly viewed status could be useful. However, since this factor requires us to evaluate viewing on a community basis for cable and non-cable homes, and significantly viewed surveys typically measure viewing only in non-cable households, such surveys may need to be supplemented with additional data concerning viewing in cable homes.[7]

6. In adopting rules to implement this provision, the Commission indicated that requested changes should be considered on a community-by-community basis rather than on a county-by-county basis, and that they should be treated as specific to particular stations rather than applicable in common to all stations in the market.[8] The rules further provide, in accordance with the requirements of the 1992 Cable Act, that a station not be deleted from carriage during the pendency of an ADI change request.[9]

7. Adding communities to a station's ADI generally entitles that station to insist on cable carriage in those communities. However, this right is subject to several conditions: 1) a cable system operator is generally required to devote no more than one-third of the system's activated channel capacity to compliance with the mandatory signal carriage obligations; 2) the station is responsible for delivering a good quality signal to the principal headend of the system; 3) indemnification may be required for any increase in copyright liability resulting from carriage; and 4) the system operator is not required to carry the signal of any station whose signal substantially duplicates the signal of any other local signal carried, or the signal of more than one local station affiliated with a particular broadcast network. If, pursuant to these requirements, a system operator elects to carry the signal of only one such duplicating signal, the operator is obliged to carry the station from the ADI whose city of license is closest to the principal headend of the cable system.[10] Accordingly, based on the specific circumstances involved, the addition of communities to a station's ADI may guarantee it cable carriage and specific channel position rights, or may simply provide the system operator with an expanded list of must-carry signals from which to choose (i.e., when the system has used up its channel capacity mandated for broadcast signal carriage, or determined which of duplicating network affiliated stations are entitled to carriage priority).

MARKET FACTS AND ARGUMENTS OF THE PARTIES

8. In its petition, KETV asks the Commission to add Lincoln and Crete, Nebraska to the Omaha, Nebraska ADI so that KETV may assert must carry rights on Lincoln Cablevision, the cable system which serves the two communities. KETV explains that Lincoln, which is located in Lancaster County, and Crete, which is located in Saline County, are currently assigned to the Lincoln-Hastings-Kearney ADI. Petitioner argues that the requested modification would better reflect marketplace conditions and would minimize disruption of cable subscribers' longstanding viewing patterns.

9. In support of its request, KETV states that it has been carried on Lincoln Cablevision continuously since cable service was established in 1969. KETV adds that it is the only ABC network affiliate currently carried on the cable system which serves approximately 70,250 subscribers in Lincoln, Crete and other communities. With respect to coverage and local service, KETV states that its Grade B signal encompasses all of Lincoln and its Grade A signal includes a significant portion of Lincoln. In addition, KETV maintains a full-time news bureau and sales office in Lincoln. KETV also notes that it covers news stories particularly relevant to residents in Lincoln and Crete as well as in-depth coverage of University of Nebraska football games and other local sporting events. As for local viewing patterns, KETV maintains that it is (1) "significantly viewed" in Lancaster and Saline Counties; (2) has a net weekly circulation in cable and non-cable households in Lancaster and Saline Counties of 81 and 58 percent, respectively; and (3) has a share of viewing in Lincoln and Saline Counties of 17 and 9 percent, respectively.

10. KHAS argues in opposition that the grant of KETV's petition would unsettle marketplace balances between the Omaha television market and the Lincoln-Hastings-

[6] H.R. Rep. 102-628, 102d Cong., 2d Sess. at 97 (1992).
[7] FCC Rcd at 2977 (emphasis in original).
[8] *Id. and* n.139.
[9] 47 C.F.R. §76.59.
[10] 8 FCC Rcd at 2981.

Kearney television market. Principally, KHAS asserts that granting KETV must carry rights on the cable system serving Lincoln and Crete, Nebraska may displace carriage of other Lincoln ADI television stations in these communities. As for the specific market modification criteria, KHAS claims that KETV fails to show that no other television station provides coverage of issues of concern to residents of Lincoln and Crete.

11. KHGI argues in opposition that KETV has failed to demonstrate that no other area television stations serve or will soon serve the subject communities. KHGI notes that KETV ignores the fact that KOLN already provides substantial public affairs programming and news of local interest to Lincoln viewers. KHGI adds that it has a permit to construct a translator in Lincoln which will soon deliver its programming to that city[11] and that the station plans on maintaining a news bureau in Lincoln to better cover local events. KHGI also voices its concern that while KHGI is in the Lincoln-Hastings-Kearney ADI, and has potential signal carriage rights on Lincoln Cablevision, its ability to enforce those rights would be eliminated if the market modification were granted because Lincoln Cablevision would carry KETV since it is the closer ABC affiliate to its principal headend. According to KHGI, this consequence would "jeopardiz[e]" KHGI's "economic viability." KHGI argues in the alternative that should the Commission grant KETV's modification request, it should not allow Lincoln Cablevision to use 47 C.F.R. §76.56(b)(5)[12] to deny carriage of KHGI either directly or through one of its translators or satellites.

12. In its consolidated reply, KETV asserts that neither KHAS or KHGI demonstrate sufficient grounds for denying its petition. KETV counters the arguments raised by the two parties that its petition should be denied because it failed to show that no other television station provides coverage of issues of concern to residents of Lincoln and Crete. KETV asserts that while KHAS and KHGI each claim that other stations in the market provide such coverage, neither licensee claims that its own station provides such coverage; furthermore, no other local station has come forward to oppose KETV's petition on this basis. KETV adds that KHAS or KHGI do not assert that KETV fails to provide coverage of issues of concern to the residents of Lincoln or Crete nor doXthey say that KETV fails to meet the other statutory market modification criteria. KETV also opposes KHGI's alternate proposal that the Commission should prohibit Lincoln Cablevision from invoking 47 C.F.R. §76.56(b)(5) if the petition for special relief is granted. In this matter, KETV asserts that KHGI acknowledges there is a substantial difference between the programming schedules of KHGI and KETV and that much of the non-duplication provision is inapplicable.

13. In its comments, Lincoln Cablevision[13] states it does not oppose KETV's request for market modification because it believes the petition has merit. In support, the operator notes the station's long history of carriage on the system and the fact that KETV provides daily coverage of Lincoln news, sports, and weather. Lincoln Cablevision further states that its comments are directed more in opposition to KHGI's request that the Commission afford KHGI extraordinary relief and require it to carry two duplicating affiliates.

14. In a late-filed pleading, KCAN argues that KETV's petition is effectively moot and should be denied. It explains that the Commission authorized KCAN's proposal to switch its designation from a satellite of KCAU, Sioux City, Iowa, to Lincoln, Nebraska's second full service commercial television station. KCAN adds that the ABC television network granted KCAN an ABC network affiliation in Lincoln, Nebraska.[14] KCAN asserts that it will soon place a City-Grade signal over both Lincoln and Crete and will begin providing ABC and local interest programming to residents of those communities. KCAN argues that these developments makes KETV's petition unnecessary because it would be the local ABC must-carry station in the Lincoln-Hastings-Kearney television market by virtue of its location. In addition, KCAN will seek to enforce any network nonduplication rights it may have against KETV. KCAN concludes by stating that once its application for a construction permit is approved, it will begin to provide local service to the residents of Lincoln and Crete, Nebraska.

15. In opposition to the KCAN pleading, KETV asks thex Commission to reject KCAN's comments because "they rest upon wholly speculative forecasts of service KCAN aspires to, but as yet does not provide to Lincoln and Crete." KETV argues that KCAN's "non-existent" service cannot be credited with any weight because KCAN is not now operating as a fully operational commercial television station broadcasting in Lincoln, Nebraska. KETV adds that KCAN's broadcast applications are still pending before the Commission and it is "impossible to predict" if and when those applications will be granted. KETV then reargues that it serves the community because it has a full-time sales office and a full-time news bureau in Lincoln. Moreover, Lincoln's Mayor has acknowledged KETV's commitment and contribution to Lincoln and has expressed his support for the inclusion of Lincoln in

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[11] According to KHGI, it requested carriage on Lincoln Cablevision but was rejected because of the station's poor signal quality as received at the system's principal headend. With the addition of a translator, KHGI hopes to provide the operator with a city-grade signal.

[12] This provision reads as follows: "A cable operator is not required to carry the signal of any local commercial television station that substantially duplicates the signal of another local commercial television station that is carried on its cable system, or to carry the signals of more than one local commercial television station affiliated with a particular network . . . . However, if a cable operator declines to carry duplicating signals, such cable operator shall carry the station whose community of license reference point . . . . is closest to the principal headend of the cable system."

[13] Cablevision asks that we accept its late-filed comments because KHGI's plea in its opposition, to bar the operator from exercising its network nonduplication rights, directly affects its interests in this matter. We believe this argument has merit and we will accept its pleading.

[14] KCAN explains that it did not oppose KETV's petition on a timely basis because, at the time the oppositions were due, it had not yet been awarded an ABC affiliation and was not in a position to comment on the petition. We believe that KCAN raises arguments pertinent to this petition and will therefore accept its late-filed pleading.

KETV's ADI. KETV then reiterates that it satisfies all the localism interests that Congress has directed the Commission to assess.

ANALYSIS AND DECISION

16. KETV has provided sufficient evidence to justify its market modification request and it will accordingly be granted. Turning to the factors specified in the 1992 Cable Act, we find that KETV has essentially met three of the four statutory elements with the historical carriage requirement and viewership showing being particularly notable. As KETV's pleading states, the station has been continuously carried on Lincoln Cablevision since 1969. The fact that the cable operator has continuously carried KETV for over 25 years demonstrates that Lincoln Cablevision and its subscribers value the station which has been the only ABC network affiliate providing service to the communities at issue.

17. The viewing pattern data in cable and non-cable households also demonstrates that KETV has a strong marketplace presence in Lincoln and Crete. The station has a substantial net weekly circulation in cable and non-cable households in Lancaster and Saline Counties of 80 and 62, respectively.[15] Its viewing share in Lincoln County and Saline County is 15 and 8 percent, respectively.[16] With respect to coverage and local service to the cable communities, we believe that KETV has shown that it provides programs of interest to Lincoln and Crete including coverage of state and local political activities along with sports and other community-specific human interest stories. A detailed news log provided by KETV supports this conclusion. Webelieve KETV's submission of a testimonial from Lincoln's mayor is also persuasive evidence that the station serves the community's needs and interests. Finally, KETV has shown that it places a Grade B contour or better over the community of Lincoln.[17] While we recognize that the station does not cover Crete with a predicted Grade B contour, we believe this should not prevent the community from being part of the modification since the record shows that KETV has provided local programming service to Crete. In any event, we believe the other factors weigh heavily in favor of granting the petition.

18. With respect to the third factor, we note that KETV fails to indicate if any other station licensed to communities within the Lincoln-Hastings-Kearney, Nebraska ADI provides coverage of, and programming to, the communities in question. We do not believe that Congress intended the third criterion to operate as a bar to a station's ADI claim whenever other stations could also be shown to serve the communities at issue. Rather, we believe that this criterion was intended to enhance a station's claim where it could be shown that other stations do not serve the communities at issue. Under such circumstances, a denial of carriage rights to the claiming station could deprive cable viewers of any broadcast signals that might provide programming geared to their communities. We view KETV's showing on each of the other factors is sufficient, and even absent enhancement under the third criterion, grant of its request is warranted.

19. Finally, we are not persuaded by the "competitive" arguments raised in either KHGI's or KCAN's pleadings. Whether the Commission grants or denies an ADI petition does not hinge on the fact that a new television station might, at some point in time, enter into the market subject to modification. Furthermore, under our carriage rules a cable operator is free to carry a second affiliate of a network if it so desires. We also refrain from addressing claims concerning the closest network affiliation rule and the network non-duplication rule[18] because such issues are outside the scope of this particular proceeding.

ORDER

20. Accordingly, IT IS ORDERED, pursuant to §614 of the Communications Act of 1934, as amended (47 U.S.C. §534), and §76.59 of the Commission's Rules (47 C.F.R. §76.59), that the petition for special relief filed July 7, 1993 by Pulitzer Broadcasting Company IS GRANTED.

21. This action is taken pursuant to authority delegated by §0.321 of the Commission's rules.

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson
Deputy Chief, Cable Services Bureau

[15] *See* Arbitron's Television County Coverage for 1993. These data are county-based, rather than community-specific. However, absent evidence that such data are not fairly reflective of viewing in the actual communities in question, such data are acceptable as probative, although not conclusive, in cases of this type.

[16] *See id.*

[17] The Commission has held that Grade B coverage demonstrates service. *See* 8 FCC Rcd at 2981.

[18] 47 C.F.R. §76.56(b)(5) and 47 C.F.R. §76.92, respectively.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re:

Pacific FM, Inc. CSR- 4445-A
San Francisco, CA

For Modification of Station
KOFY-TV's ADI and
Emergency Petition for Relief

MEMORANDUM OPINION AND ORDER

Adopted: March 22, 1995; Released: March 31, 1995

By the Cable Services Bureau:

INTRODUCTION

1. Before the Commission are two interrelated matters involving Pacific FM, Inc. ("Pacific"), licensee of television station KOFY-TV ("KOFY")(Ch. 20), San Francisco, CA, and Falcon Cable Systems Company ("Falcon"). Falcon dropped the station's signal from its channel line-up on December 31, 1994. The first matter involves a petition filed by Pacific on January 5, 1995 seeking reinstatement of KOFY-TV's signal on Falcon's Gilroy system. Falcon opposed this petition on January 20, 1995 and KOFY filed a reply to this opposition on January 25, 1995.

2. The second matter involves a petition for special relief filed by Pacific on December 22, 1994, seeking modification of KOFY's market area (ADI) to include the California communities of Hollister, San Juan Bautista, Salinas, Prunedale, Carmel Highlands, Castroville, Las Lomas, Moss Landing, Oakhills, and portions of San Benito and Monterey Counties in the San Francisco-Oakland-San Jose, California ADI. On December 29, 1994, Falcon, the operator of a cable television system serving Gilroy, California and certain surrounding communities, requested that the KOFY petition be dismissed and not accepted for filing. Cypress Broadcasting, Inc., licensee of television station KCBA, Salinas, CA, filed an opposition to the petition on February 13, 1995. Pacific replied to this opposition on February 28, 1995. On March 16, 1995, EP Communications ("EP"), licensee of KSBW, Salinas, CA, submitted late-filed comments in support of the opposition filed by Cypress Broadcasting.

BACKGROUND

3. Pursuant to §4 of the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act")[1] and implementing rules adopted by the Commission in its Report and Order in MM Docket No. 92-259,[2] a commercial television broadcast station is entitled to assert mandatory carriage rights on cable systems located within the station's market. A station's market for this purpose is its "area of dominant influence," or ADI, as defined by the Arbitron audience research organization.[3] An ADI is a geographic market designation that defines each television market exclusive of others, based on measured viewing patterns. Essentially, each county in the United States is allocated to a market based on which home-market stations receive a preponderance of total viewing hours in the county. For purposes of this calculation, both over-the-air and cable television viewing are included.[4]

4. This section of the 1992 Cable Act also provides that the Commission may:

> with respect to a particular television broadcast station, include additional communities within its television market or exclude communities from such station's television market to better effectuate the purposes of this section.

In considering such requests, the 1992 Cable Act provides that:

> the Commission shall afford particular attention to the value of localism by taking into account such factors as:
>
> (I) whether the station, or other stations located in the same area, have been historically carried on the cable system or systems within such community;
>
> (II) whether the television station provides coverage or other local service to such community;
>
> (III) whether any other television station that is eligible to be carried by a cable system in such community in fulfillment of the requirements of this section provides news coverage of issues of concern to such community or provides carriage or coverage of sporting and other events of interest to the community; and
>
> (IV) evidence of viewing patterns in cable and noncable households within the areas served by the cable system or systems in such community.

5. The legislative history of this provision indicates that:

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[1] Pub. L. No. 102-385, 106 Stat. 1460 (1992).

[2] *Broadcast Signal Carriage Issues*, 8 FCC Rcd 2965, 2976-2977 (1993).

[3] Section 4 of the 1992 Cable Act specifies that a commercial broadcasting station's market shall be determined in the manner provided in §73.3555(d)(3)(i) of the Commission's Rules, as in effect on May 1, 1991. This section of the rules, now redesignated §73.3555(e)(3)(i), refers to Arbitron's ADI for purposes of the broadcast multiple ownership rules. Section 76.55(e) of the Commission's Rules provides that the ADIs to be used for purposes of the initial implementation of the mandatory carriage rules are those published in Arbitron's 1991-1992 Television Market Guide.

[4] Certain counties are divided into more than one sampling unit because of the topography involved. Also, in certain circumstances, a station may have its home county assigned to an ADI even though it receives less than a preponderance of the audience in that county. Refer to Arbitron's *Description of Methodology* handbook for a more complete description of how counties are allocated.

where the presumption in favor of ADI carriage would result in cable subscribers losing access to local stations because they are outside the ADI in which a local cable system operates, the FCC may make an adjustment to include or exclude particular communities from a television station's market consistent with Congress' objective to ensure that television stations be carried in the areas which they serve and which form their economic market.

* * * * *.

[This subsection] establishes certain criteria which the Commission shall consider in acting on requests to modify the geographic area in which stations have signal carriage rights. These factors are not intended to be exclusive, but may be used to demonstrate that a community is part of a particular station's market.[5]

6. The Commission provided the following guidance in the *Report and Order* to aid decision making in these matters:

For example, the historical carriage of the station could be illustrated by the submission of documents listing the cable system's channel line-up (*e.g.*, rate cards) for a period of years. To show that the station provides coverage or other local service to the cable community (factor 2), parties may demonstrate that the station places at least a Grade B coverage contour over the cable community or is located close to the community in terms of mileage. Coverage of news or other programming of interest to the community could be demonstrated by program logs or other descriptions of local program offerings. The final factor concerns viewing patterns in the cable community in cable *and* noncable homes. Audience data clearly provide appropriate evidence about this factor. In this regard, we note that surveys such as those used to demonstrate significantly viewed status could be useful. However, since this factor requires us to evaluate viewing on a community basis for cable and noncable homes, and significantly viewed surveys typically measure viewing only in noncable households, such surveys may need to be supplemented with additional data concerning viewing in cable homes.[6]

7. In adopting rules to implement this provision, the Commission indicated that requested changes should be considered on a community-by-community basis rather than on a county-by-county basis, and that they should be treated as specific to particular stations rather than applicable in common to all stations in the market.[7] The rules further provide, in accordance with the requirements of the 1992 Cable Act, that a station not be deleted from carriage during the pendency of an ADI change request.[8]

8. Adding communities to a station's ADI generally entitles that station to insist on cable carriage in those communities. However, this right is subject to several conditions: 1) a cable system operator is generally required to devote no more than one-third of the system's activated channel capacity to compliance with the mandatory signal carriage obligations; 2) the station is responsible for delivering a good quality signal to the principal headend of the system; 3) indemnification may be required for any increase in copyright liability resulting from carriage; and 4) the system operator is not required to carry the signal of any station whose signal substantially duplicates the signal of any other local signal carried, or the signal of more than one local station affiliated with a particular broadcast network. If, pursuant to these requirements, a system operator elects to carry the signal of only one such duplicating signal, the operator is obliged to carry the station from the ADI whose city of license is closest to the principal headend of the cable system.[9] Accordingly, based on the specific circumstances involved, the addition of communities to a station's ADI may guarantee it cable carriage and specific channel position rights, or may simply provide the system operator with an expanded list of must-carry signals from which to choose (i.e., when the system has used up its channel capacity mandated for broadcast signal carriage, or determined which of duplicating network affiliated stations are entitled to carriage priority).

9. Of particular importance to this proceeding are two specific provisions of the Act. The market modification provision (Section 614(h)(1)(c)(iii)), which provides that "A cable operator shall not delete from carriage the signal of a commercial television station during the pendency of any proceeding pursuant to this subparagraph." And the basic mandatory carriage provision (Section 614(h)(1)(b)(ii)), which provides that the must carry requirements do not include "a television broadcast station that would be considered a distant signal under section 111 of title 1, United States Code, if such station does not agree to indemnify the cable operator for any increased copyright liability resulting from carriage on the cable system."

EMERGENCY PETITION FOR RELIEF

10. Pacific filed an emergency petition for relief on January 5, 1995 because Falcon had deleted the station's signal from its Gilroy, California cable system on December 31, 1994. Pacific asserts that Falcon's action was in violation of 47 C.F.R. §76.59 and, in this instance, asks the Commission to require the operator to resume carriage of the station's signal.

11. Pacific's arguments revolve around issues of notification and copyright indemnification. Pacific first asserts that Falcon failed in the time frame provided by the Commission's rules to notify KOFY of potential copyright liability for carriage of the station's signal into a distant ADI. Moreover, once Falcon did notify the station, KOFY maintains that it was given an "unreasonable" two day deadline to agree to indemnify for copyright. The station then argues that Falcon did not provide sufficient documentation

[5] H.R. Rep. 102-628, 102d Cong., 2d Sess. at 97 (1992).
[6] 8 FCC Rcd at 2977 (emphasis in original).
[7] *Id.* and n.139.
[8] 47 C.F.R. §76.59.
[9] 8 FCC Rcd at 2981.

to support its estimated copyright liability. Pacific asserts that Falcon intentionally disregarded the Commission's notification rules and used the station's failure to indemnify as a reason to remove KOFY from its system's line-up and replace it with another San Francisco television station.

12. Pacific additionally argues that its market modification filing, submitted on December 22, 1994, imposed an automatic stay on Falcon's ability to delete the station from carriage.[10] Pacific asserts that Section 614 (h)(1)(C)(iii)'s stay requirement prevails over Section 614(h)(1)(B)(ii)'s copyright indemnification requirement arguing that a cable operator must maintain carriage of a station seeking to expand its television market regardless of other circumstances. The former is the 1992 Cable Act provision which states that an operator shall not drop a television station from a cable system during the pendency of a market modification request. The latter refers to the 1992 Cable Act provision which states that a cable operator shall not be required to carry the signal of a television station which refuses to indemnify for copyright liability. The station then challenges Falcon's argument that Pacific's market modification petition should be dismissed because no case or controversy exists. KOFY claims that even though the system is technically integrated and Falcon cannot segregate signals, the petition is necessary to perfect its must carry rights in the distant Salinas-Monterey ADI. Finally, Pacific contends that KOFY is under no obligation to provide copyright indemnification noting that Falcon could easily seek a rate increase resulting from the copyright liability incurred by virtue of the station's carriage.

13. It its opposition to the petition for emergency relief, Falcon asserts that this proceeding raises the singular issue of whether a broadcast station may use the Commission's market modification procedures to "evade its statutory obligation" to indemnify a cable operator. The operator explains that when it added KOFY to its Gilroy system in January 1994 in place of another local commercial station whose carriage has been discontinued, it was unaware of the substantial copyright liability (approximately $92,000 annually) that would result from the carriage of KOFY.[11] Falcon adds that on November 22, 1994, it wrote to KOFY to explain the discovered liability and gave the station an opportunity to indemnify for that copyright liability on a going forward basis, beginning on January 1, 1995, as a condition of continued carriage. Falcon states that it attempted to contact the station on November 23, 1994, and again on the morning of November 28, 1994, to ascertain whether indemnification was forthcoming. The operator further states that at 5:02 P.M. on November 28, 1994, it sent KOFY a facsimile letter and indemnification agreement indicating that if the station did not agree to indemnify Falcon by 3:00 P.M. the next day (November 29, 1994), the station could consider itself on notice that Falcon would discontinue carriage of KOFY on the Gilroy system effective at the end of the year. Falcon then asserts that on November 29, 1994, Mike Lincoln, KOFY's General Manager, "clearly and unambiguously" told Bruce Williams, Falcon's Regional Manager, that it would not indemnify Falcon for carriage of KOFY.[12] Following that refusal, Falcon finalized arrangements to obtain a replacement local commercial station to be carried in place of KOFY beginning at midnight, December 31, 1994.

14. Falcon argues that Pacific's emergency petition is filled with inaccuracies and distortions. The operator first disputes Pacific's statement that it maneuvered to remove the station from the cable system in order to replace it with another station. Falcon counters this point by stating that since it was already carrying its full complement of local commercial stations, it had no obligation to provide Pacific with any opportunity to indemnify before replacing that station with another local commercial station. Falcon adds that all that was required was thirty days written notice (which it gave on November 28, 1994) to KOFY that its carriage was being discontinued. As for the claim that the operator did not provide KOFY with sufficient indemnification calculations, Falcon argues that Pacific "has revised history to suit its own purpose" and that the station did not care for such information until after it had rejected Falcon's indemnification request. Falcon concludes by arguing that Pacific intentionally created a statutory conflict "by attempting to misuse the ADI modification procedures to evade its copyright indemnification obligations." The operator urges the Commission not to be a party to "such an abuse of process."

15. In its reply, Pacific asserts that Falcon has confused the facts preceding the filing of its petition for special relief. Pacific maintains that channel capacity issues are not relevant here as much as Falcon's alleged violations of the Commission's notification and market modification rules. Pacific first contends that Falcon failed to notify by May 3, 1993, all relevant local commercial and NCE television stations of the reasons why they would not be carried on its cable system. Additionally, Pacific argues that Falcon did not supply written documentation of copyright calculations within three business days of the request made on November 30, 1994. Pacific concludes by reasserting that a cable operator, like Falcon, may not delete a signal from carriage during the pendency of a market modification request and that the stay is statutorily mandated and is not dependent on whether the petitioner is likely to succeed on the merits.

MARKET MODIFICATION

MARKET FACTS AND ARGUMENTS OF THE PARTIES

16. KOFY is in the San Francisco-Oakland-San Jose ADI and has been carried by Falcon Cable on its Gilroy, California cable system which is also situated in part in the same ADI. This system also serves communities located in the adjacent Salinas-Monterey ADI, in which KOFY presently does not have independent signal carriage rights. In its petition, KOFY asks the Commission to modify its ADI

[10] *See* 47 C.F.R. 76.59(c).

[11] Falcon explains that the confusion can be traced to the fact that when it carried KOFY in the late 1970's and early 1980's, the station was considered a specialty station under the Commission's rules. According to Falcon, as of January 1, 1991, KOFY was no longer recognized as a specialty station by the U.S. Copyright Office for the purpose of calculating royalty fees under the cable compulsory license.

[12] According to Falcon, KOFY's refusal to indemnify was reaffirmed in a December phone conversation between Bruce Williams and Paul McCarthy, the station's independent consultant.

so that the above-referenced communities located in the Salinas-Monterey ADI, may also be part of the San Francisco-Oakland-San Jose ADI for must carry purposes.

17. Pacific asserts that Falcon planned to drop KOFY from carriage on its Gilroy system on December 31, 1994 due to increased copyright liability incurred by virtue of the station's carriage in another ADI. The station argues that the expansion of its ADI to include the relevant communities in the Salinas-Monterey ADI will eliminate that increased liability because the Copyright Act does not require payment by a cable operator if a relevant television station is wholly within the same ADI as the cable system. In support of its modification request, Pacific argues that KOFY was historically carried noting it was part of the Gilroy system's channel line-up for most of the 1970s and early 1980s until approximately 1982. Pacific adds that the operator recommenced carriage of KOFY in January 1994. KOFY submits that similarly situated "distant" independent television stations, such as KTVU (Oakland) and KBHK (San Francisco), have been carried continuously since at least 1982-83. Carriage of these "similar" stations, Pacific argues, "demonstrates that the Communities are part of KOFY's television market and that its television market should be expanded to include the Communities."

18. In addition, Pacific states that its predicted Grade B contour extends over 50 miles in the direction of the communities. Pacific then states that while its predicted Grade B contour does not cover the communities, the distance between the Grade B and the communities is minimal. Pacific asserts that given that the Grade B is merely a predicted contour, it can be expected that a reliable signal travels beyond its predicted reach. For that reason, the station argues that it can be presumed that KOFY provides coverage to the communities.

19. Finally, Pacific argues that its programming is unique in many ways. First, Pacific states that it makes use of a SAP (second audio program) channel during the majority of its programming day to broadcast its programming in Spanish and provide service to the "significant" Hispanic population in the communities. Pacific argues that the public interest will not be served if Falcon deletes its signal from its Gilroy system's line-up because these particular communities will lose a special service.[13] Pacific also explains that since it recently affiliated with the newly launched WB (Warner Brothers) Network, deletion of its signal would not be in the public interest because it will deprive subscribers of access to a new programming service.

20. In a December 29, 1994 letter filed with the Commission, Falcon urges the Commission to dismiss Falcon's petition and asks that it not be accepted for filing. Falcon asserts that it does not dispute that KOFY's must carry rights extend to all the communities served by its Gilroy system, including the communities in San Benito and Monterey counties, rather, it simply wants to be indemnified to protect itself against copyright liability. Falcon explains that its Gilroy system operates within the San Francisco-Oakland-San Jose ADI and the Salinas-Monterey ADI and asserts that because its cable system is technically integrated, it is unable to segregate channels to carry local broadcast stations solely within their respective ADIs. Since the disputed communities served by Falcon lie in an ADI other than KOFY's, Falcon asserts that it would be liable for copyright payments resulting from the carriage of the station in these communities.

21. Falcon asserts that the "true intent" of Pacific's ADI modification petition is to try to force Falcon to continue to carry KOFY even though it has refused to indemnify Falcon for the copyright costs. The operator argues that it would be inequitable to allow KOFY to "escape its obligation" to provide copyright indemnification by allowing it to use the Commission's market modification procedures as a means of ensuring continued carriage. Falcon then asserts that even if the modification request were granted, it is still under no obligation to carry the station because the system is presently carrying its full quota of 12 local commercial television stations.[14]

22. Like Falcon, Cypress argues that Pacific's petition is an attempt to evade its statutory obligation to indemnify the cable operator for copyright liability. Cypress then contends that Pacific does not meet the Commission's requirements for expansion of its market area to include the non-ADI communities that it requests. Specifically, Cypress argues that KOFY: 1) has not been historically carried on Falcon's Gilroy cable system; 2) has failed to show that other eligible television stations do not provide adequate service to the non-ADI communities; 3) does not cover the non-ADI communities with a Grade B contour; and 4) has totally failed to provide any evidence of viewing patterns in cable and noncable households within the areas served by Falcon's Gilroy system.[15]

23. In its reply, Pacific maintains that little weight should be given to Cypress' opposition, which it says is "nothing more than a thinly-veiled attempt to avoid the competition posed by KOFY-TV." Pacific attempts to refute Cypress' statement that KOFY's market modification petition is based on a desire to avoid copyright payments. Instead, Pacific argues, the petition is designed to perfect its must carry rights within its television market. As for the four statutory factors, Pacific reiterates that KOFY has been historically carried and repeats its argument that similarly situated stations in the market have had long histories of

[13] KOFY also argues that it devotes substantial time to promoting events in the communities. *See* Petition at Exhibit A.

[14] Falcon notes that its Gilroy system only has 35 usable activated channels and that there are 23 commercial television stations licensed collectively to the San Francisco and Salinas-Monterey ADIs.

[15] In its late-filed comments in support of Cypress' opposition, EP states that Pacific's market modification petition should be denied because: 1) KOFY's "carriage [on the Gilroy cable system] for just one of the last 13 years hardly constitutes the historic carriage' required to satisfy the first component of the Commission's standards"; 2) KOFY has not provided any evidence that it airs news stories or public affairs programs which address the interests and concerns of residents in the Salinas-Monterey ADI communities; 3) Residents of the Salinas-Monterey ADI communities presently receive significant and ongoing local service and news coverage from the six television stations licensed to communities within the Salinas-Monterey ADI, including KSBW which airs a large amount of local interest programming and documentaries; and 4) KOFY has not provided the Commission with any evidence of viewing patterns in the cable and non-cable households of the Salinas-Monterey Communities. We shall accept EP's filing, even though it was late-filed, because it is useful in our assessment of Pacific's market modification petition.

carriage on the system. Pacific alternatively argues that KOFY's situation is analogous to the situation of a station subject to a petition seeking to exclude communities from a market and that even if it has failed to demonstrate historical carriage, such a failure should be irrelevant to a decision in this proceeding. Pacific also dismisses Cypress' argument that other Salinas-Monterey ADI stations provide local news and other programming because this information, which falls under statutory factor III, is only relevant when other stations do not serve the communities at issue. Finally, Pacific presents viewing pattern information culled from Nielsen's "1994 County/Coverage Study County Summary." According to Pacific, these data reveal that KOFY is viewed in both cable and non-cable homes in San Benito County; there, KOFY achieved a total share of 1 and a total net weekly circulation of 7. Pacific explains that viewing data were "not available" for Monterey County.

ANALYSIS AND DECISION

24. Pacific, in its market modification petition, has not demonstrated that the cable communities in question are logically part of its ADI market under the factors specified in the 1992 Cable Act and it must accordingly be denied. At the outset, it should be noted that KOFY is seeking to include within the San Francisco-Oakland-San Jose ADI, a core city in the smaller neighboring Salinas-Monterey market that is outside of its Grade B contour and is some 85 miles distant. Thus, at the outset, based on the general geography and market structures implicated, it is not evident that the requested change would involve a preferable allocation of the area in question between the markets or how granting the request would "better effectuate the purposes" of the applicable statutory provisions. KOFY has also not demonstrated the change requested is warranted based on the four statutory market modification criteria.

25. Pacific has not shown that KOFY has been historically carried on Falcon's Salinas-Gilroy system. While the station was carried in the 1970's and early 1980's, it was absent from the cable system's line-up for nearly twelve years beginning in 1982 and did not reappear on Falcon's line-up until 1994 when it was reintroduced because of the Commission's signal carriage rules.[16] Aside from the fact that the station has a SAP channel allowing it to broadcast in Spanish and airs some community specific programming, Pacific has not demonstrated that KOFY provides service to the named communities. The station admits that its predicted Grade B contour does not cover the communities in question and provides no basis for presuming that it provides coverage simply because the communities at issue are on the outside fringe of the predicted Grade B contour.[17] Pacific also fails to address statutory factor III and does not provide information on other stations that are carried by the cable system and provide local programming tailored to the Salinas-Monterey market.

26. KOFY's evidence relating to viewing patterns in the communities in question also does not suggest a close association of the communities with KOFY or that the market structure should be revised. Pacific has presented data that it has only a 1 share of the audience and a 7 percent net weekly circulation in San Benito County. While the Commission has not adopted a minimum level for acceptable share or net weekly circulation, these numbers, when compared with those of other area stations, do not show that viewers in cable and non-cable homes in the County rise to a level that demonstrates that the disputed communities served by Falcon are in the same economic marketplace as are stations in the San Francisco-Oakland-San Jose ADI. While Pacific explains that it did not submit Monterey County viewership data because such information was "not available," that suggests that the numbers may have been low to be deemed reportable. In any event, it leaves the record without evidence to support the requested action with respect to the Monterey County communities.

27. Since we deny Pacific's modification request, KOFY is still considered distant for copyright purposes on those portions of Falcon's cable system serving communities in the Salinas-Monterey ADI and, assuming as the parties do, that community-by-community compliance with the carriage rules is not technically feasible, the station is eligible for mandatory carriage on the Gilroy-Salinas cable system only if it undertakes responsibility for any additional copyright liability that may be incurred by the cable system. Section 614 clearly provides that Falcon is not required to carry a commercial television station, like KOFY, that would be considered distant under the cable compulsory copyright license unless that station agrees to indemnify the cable operator for any increased copyright liability resulting from its carriage.[18] A cable system, like Falcon's, that operates in more than one ADI may segregate its signal to ensure that only local signals are carried by the system in their proper ADIs, but it is not required to do so if it is not technically feasible.[19] "However, if the cable system is not able to alter its channel line-up on a community-by-community basis and the system straddles two ADIs, all broadcast stations in both ADIs will be considered 'local' for must-carry purposes."[20] This does not mean that broadcast stations will be considered "local" for copyright purposes. Instead, this clarification was issued by the Commission to ensure that eligible must carry broadcast stations could not be wholly excluded from carriage by cable systems that operate in more than one ADI.[21] It was

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[16] In addition, Pacific attempts to show that similarly situated distant independent television stations have a history of carriage on the system. Pacific argues that carriage of these stations demonstrates that the named communities are part of KOFY's television market and that its television market should be expanded to include the named communities. We find Pacific's arguments unpersuasive. We do not believe that historical carriage of the signals of the two most widely distributed independent stations from KOFY's market (KTVU and KBHK) is persuasive evidence that the communities in question should be considered part of the San Francisco-Oakland-San Jose ADI. One or both of these signals are carried on cable systems north, east, and south of the San Francisco-Oakland-San Jose market, including, for example, in Sacramento, Stockton, Modesto, and Monterey.

[17] *See Complaint of KTEH-TV Foundation against Viacom Cable*, 9 FCC Rcd 4433 at para. 5.

[18] *See* 47 U.S.C. §534(h)(1)(B)(ii); 47 C.F.R. §76.55(c)(2).

[19] *See* 8 FCC Rcd at 2976-77.

[20] *Id.* at 2977.

[21] *See* 8 FCC Rcd at 2976 and note 118.

not intended to eliminate the indemnification requirement imposed on must carry stations that are considered distant for copyright purposes.

28. Falcon was operating in compliance with Commission rules and policies when it gave more than 30 days prior notice and dropped KOFY from its channel line-up after the station failed to indemnify for copyright. In addition, it was adhering to the rules when it chose to select another must carry signal from the pool of qualified stations to replace KOFY and satisfy its one-third mandatory carriage channel capacity cap. The system has a 35 channel capacity and has, according to the information filed in this proceeding, reached its quota of 12 must carry signals. Under the law in its markets, Falcon can choose from a pool of over 20 different commercial television stations for carriage on its system. The operator gave KOFY the opportunity to be one of those 12 signals but Pacific declined to indemnify; it then selected another qualified signal to be carried in place of KOFY. Accordingly, we find that Falcon has fulfilled its signal carriage obligations under the 1992 Cable Act and the Commission's rules.

29. In light of the conclusion reached herein that the San Benito and Monterey County communities served by Falcon should not be included within the San Francisco-Oakland-San Jose, California ADI, no grounds exist for requiring Falcon to restore carriage of the signal of KOFY. Pacific has not persuasively supported it's assertion that, in the circumstances involved herein, Section 614 (h)(1)(C)(iii)'s stay requirements takes precedence over Section 614(h)(1)(B)(ii)'s exemption from carriage for failure to provide copyright indemnification. Although more notice should have been provided by Falcon as to the copyright liability, it is inconsistent with the general theory and specific requirements of the 1992 Cable Act to require carriage of a broadcast signal that is distant for copyright purposes and which would expose the system operator to additional copyright liability.

ORDER

30. Accordingly, IT IS ORDERED, pursuant to §614 of the Communications Act of 1934, as amended (47 U.S.C. §534), and §76.59 of the Commission's Rules (47 C.F.R. §76.59), that the petition for special relief filed on December 22, 1994 by Pacific FM Broadcasting, Inc. IS DENIED.

31. IT IS FURTHER ORDERED that the emergency petition for relief filed on January 5, 1995 by Pacific FM Broadcasting, Inc. IS DENIED. This action is taken pursuant to authority delegated by §0.321 of the Commission's rules.

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson
Deputy Chief, Cable Services Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In re:

Meredith Corporation CSR-3987-A
Bay City, Michigan

For Modification of Station
WNEM-TV's ADI

MEMORANDUM OPINION AND ORDER

Adopted: March 23, 1995; Released: March 31, 1995

By the Cable Services Bureau:

INTRODUCTION

1. In the captioned proceeding, Meredith Corporation, licensee of Station WNEM-TV (NBC, Channel 5), Bay City, Michigan,[1] has requested the Commission to include various cable communities to the Flint-Saginaw-Bay City, Michigan area of dominant influence (or "ADI"), to which it is currently assigned, for purposes of the cable television mandatory broadcast signal carriage rules.[2] This petition is unopposed.

BACKGROUND

2. Pursuant to Section 4 of the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act")[3] and implementing rules adopted by the Commission in its *Report and Order* in MM Docket No. 92-259,[4] commercial television broadcast stations are entitled to assert mandatory carriage rights on cable systems located within the station's market. A station's market for this purpose is its "area of dominant influence," or ADI, as defined by the Arbitron audience research organization.[5] An ADI is a geographic market designation that defines each television market exclusive of others, based on measured viewing patterns. Essentially, each county in the United States is allocated to a market based on which home-market stations receive a preponderance of total viewing hours in the county. For purposes of this calculation, both over-the-air and cable television viewing are included.[6]

3. Under the Act, however, the Commission is also directed to consider changes in ADI areas. Section 614(h) provides that the Commission may:

> with respect to a particular television broadcast station, include additional communities within its television market or exclude communities from suchPstation's television market to better effectuate the purposes of this section.

In considering such requests, the 1992 Cable Act provides that:

> the Commission shall afford particular attention to the value of localism by taking into account such factors as--
>
> (I) whether the station, or other stations located in the same area, have been historically carried on the cable system or systems within such community;
>
> (II) whether the television station provides coverage or other local service to such community;
>
> (III) whether any other television station that is eligible to be carried by a cable system in such community in fulfillment of the requirements of this section provides news coverage of issues of concern to such community or provides carriage or coverage of sporting and other events of interest to the community; and
>
> (IV) evidence of viewing patterns in cable and noncable households within the areas served by the cable system or systems in such community.[7]

4. The legislative history of this provision indicates that:

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[1] WNEM-TV changed its network affiliation to CBS on January 16, 1995.

[2] The Michigan communities that Meredith wants to include in its ADI are as follow: in Alcona County (which is served by TMC of Saginaw Bay, "TMC"), Harrisville, Oscoda, and unincorporated portions of Alcona County; in Lapeer County (which is served in part by Fenton Cablevision), Imlay City, Deerfield Township, and portions of unincorporated Lapeer County; (in the portion of the County served by Cable Properties, Inc.), Clifford, Attica Township, and Arcadia Township; (in the part of the County served by C-TEC Cable Systems, "C-TEC"), Imlay City, Lapeer, Elba Township, Mayfield Township, and portions of unincorporated Lapeer County; (in the portion of the County served by Concord Telecommunications), Metamora, Elba Township, Hadley Township, and unincorporated Lapeer County; and (in that part of the County served by Fanch Communications, Inc. "Fanch"), Almont, Davison, Dryden, Imlay City, North Branch Township, and portions of Genesse and Lapeer Counties.

[3] Pub. L. No. 102-385, 106 Stat. 1460 (1992).

[4] 8 FCC Rcd 2965, 2976-2977 (1993).

[5] Section 4 of the 1992 Cable Act specifies that a commercial broadcasting station's market shall be determined in the manner provided in §73.3555(d)(3)(i) of the Commission's Rules, as in effect on May 1, 1991. This section of the rules, now redesignated §73.3555(e)(3)(i), refers to Arbitron's ADI for purposes of the broadcast multiple ownership rules. Section 76.55(e) of the Commission's Rules provides that the ADIs to be used for purposes of the initial implementation of the mandatory carriage rules are those published in Arbitron's 1991-1992 *Television Market Guide*.

[6] Because of the topography involved, certain counties are divided into more than one sampling unit. Also, in certain circumstances, a station may have its home county assigned to an ADI even though it receives less than a preponderance of the audience in that county. For a more complete description of how counties are allocated, *see* Arbitron's *Description of Methodology*.

[7] 47 U.S.C. §534(h)(1)(C)(ii).

> The provisions of (this subsection) reflect a recognition that the Commission may conclude that a community within a station's ADI may be so far removed from the station that it cannot be deemed part of the station's market. It is not the Commission's intention that these provisions be used by cable systems to manipulate their carriage obligations to avoid compliance with the objectives of this section. Further, this section is not intended to permit a cable system to discriminate among several stations licensed to the same community. Unless a cable system can point to particularized evidence that its community is not part of one station's market, it should not be permitted to single out individual stations serving the same area and request that the cable system's community be deleted from the station's television market.[8]

5. The Commission provided guidance in *MM Docket 92-259, supra,* to aid decision making in these matters, as follows:

> For example, the historical carriage of the station could be illustrated by the submission of documents listing the cable system's channel line-up (*e.g.,* rate cards) for a period of years. To show that the station provides coverage or other local service to the cable community (factor 2), parties may demonstrate that the station places at least a Grade B coverage contour over the cable community or is located close to the community in terms of mileage. Coverage of news or other programming of interest to the community could be demonstrated by program logs or other descriptions of local program offerings. The final factor concerns viewing patterns in the cable community in cable *and* noncable homes. Audience data clearly provide appropriate evidence about this factor. In this regard, we note that surveys such as those used to demonstrate significantly viewed status could be useful. However, since this factor requires us to evaluate viewing on a community basis for cable and noncable homes, and significantly viewed surveys typically measure viewing only in noncable households, such surveys may need to be supplemented with additional data concerning viewing in cable homes.[9]

6. In adopting rules to implement this provision, the Commission indicated that changes requested should be considered on a community-by-community basis, rather than on a county-by-county basis, and that they should be treated as specific to particular stations rather than applicable in common to all stations in the market.[10] The rules further provide, in accordance with the requirements of the 1992 Cable Act, that a station not be deleted from carriage during the pendency of an ADI change request.[11]

MARKET FACTS AND PETITIONER'S ARGUMENTS

7. Lapeer County is currently assigned to the Detroit, Michigan ADI. However, Lapeer is within WNEM-TV's Grade B contour, and it is located on the southeastern border of the Flint-Saginaw-Bay City ADI. WNEM-TV notes that, while Detroit is more than 51 miles from Lapeer, Lapeer is only about 47 miles from Bay City. Alcona County, which is presently assigned to the Alpena, Michigan ADI, is located on the northern boarder of the Flint-Saginaw-Bay City ADI but outside of WNEM-TV's Grade B contour. WNEM-TV is also significantly viewed in both counties.[12]

8. WNEM-TV also notes that TMC, the cable system serving Alcona has carried it since December 1963, while the five cable systems it lists serving Lapeer have each transmitted the station at least since 1989 (and in one case, C-TEC, has done so since June 1980).[13] WNEM-TV adds that it had an 8 share and a 63 net weekly circulation in Lapeer County, according to Nielsen's 1992 Michigan *County/Coverage Study,* while it received a 21 share and a 55 net weekly circulation in noncable homes in Alcona County, according to the same study. WNEM-TV adds that this viewing made it the second most watched station in Alcona County, which is within the Grade B contour of only one television signal, Station WBKB-TV (CBS, Channel 11), Alpena, Michigan. According to WNEM-TV, it broadcasts local news at 6:00 pm and at 11:00 pm on weekends, and at 6:30 am, noon, 5:00 pm, 6:00 pm, and 11:00 pm on weekdays, and these broadcasts frequently include items concerning events in both in Alcona and in Lapeer Counties (such as the March 1993 reports on winter road damage in Lapeer and the local corn crop disaster, and the April 1992 nurses' strike at the Lapeer regional hospital). In addition, WNEM-TV states that the Lapeer Regional Medical Center has sponsored a number of health related public affairs programs on the station, and that various community leaders in the City of Lapeer have asked that the station include them in its "Our Town" project.[14] WNEM-TV adds that, for Alcona County, it is the main source of local weather information, bulletins, and warnings and that, since its signal reaches further north than any other station assigned to the Flint-Saginaw-Bay City ADI, Alcona County businesses can advertise with it in order to reach the Bay City area. WNEM-TV adds that television advertisers from Lapeer County consistently sponsor its programming, at least partially because its rates are much more attractive than those of the larger market Detroit stations.

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[8] H.R. Rep. 102-628, 102d Cong., 2d Sess. 97-98 (1992).
[9] *MM Docket No. 92-259,* 8 FCC Rcd at 2977.
[10] *Id.,* n.139.
[11] 47 C.F.R. §76.59.
[12] For a network station to be deemed significantly viewed in a community or in a county, it must achieve in noncable homes a share of viewing hours of at least 3 percent (total week hours) and a net weekly circulation of at least 25 percent. 47 C.F.R. Section 76.5(i).
[13] According to WNEM-TV, Fenton Cablevision has carried it since September 1980, while the Fanch system has transmitted it since November 1984, and Concord Telecommunications has rebroadcast the station since July 1987, and Cable Properties, Inc. has carried WNEM-TV since December 1989.
[14] According to Paul T. Virciglio, Vice President and General Manager of WNEM-TV, this is a project which devotes a week to focusing on a particular community within the station's service area, during which time the station features that particular community in its promotions, PSA's, community calendar, and news reports.

ANALYSIS AND DECISION

9. WNEM-TV has demonstrated in its petition that the Lapeer and Alcona County communities in question may logically be included in its ADI market area for purposes of the cable television mandatory broadcast signal carriage rules under the standards set forth in Section 614(h) of the Communication Act and its petitions will accordingly be granted. WNEM-TV has demonstrated a history of carriage on the cable systems serving the listed communities in both counties. The station has also shown that it has carried programming of interest to the relevant communities and has demonstrated high levels of audience, both over-the-air and on cable, in both Alcona and Lapeer Counties.[15] With respect to Lapeer county, WNEM-TV encompasses the communities in question with a Grade B contour and the communities are closer to Bay City, Saginaw, and Flint than they are to Detroit. The Commission has said that service can be demonstrated by the presence of a station's Grade B contour.[16] The above circumstances easily demonstrate compliance with the statutory factors with respect to Lapeer County.

10. The situation with respect to the Alcona County communities is somewhat different because these communities are more distant from Bay City and WNEM-TV's transmitter location and because they are not within the Grade B contour of the station. Nevertheless, the fact that the station has been carried on cable system in the area since 1963 and the high level of over-the-air audience in the County, with WNEM-TV being the second highest ranked station in the County, make out a strong case that the communities are logically part of WNEM-TV's market area for purposes of the mandatory signal carriage rules.

11. Although WNEM-TV has not fully addressed the third statutory factor -- whether other stations entitled to carriage provide news and other programming of concern or interest to the communities in question -- we do not believe that Congress intended this criterion to operate as a bar to a station's ADI claim whenever other stations could also be shown to serve the communities at issue, but rather that this criterion was intended to enhance a station's claim where it could be shown that other stations *do not* serve the communities at issue.

ORDERING CLAUSES

12. Accordingly, IT IS ORDERED, pursuant to Section 614(h)(1)(C) of the Communications Act of 1934, as amended (47 U.S.C. Section 534(h)(1)(C)), That the petition for special relief (CSR-3987-A) filed June 8, 1993, by Meredith Corporation IS GRANTED.

13. This action is taken pursuant to authority delegated by Section 0.321 of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson
Deputy Chief, Cable Services Bureau

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[15] WNEM-TV had an 8 share and a 63 net weekly circulation in Lapeer County, according to Nielsen's 1992 Michigan *County/Coverage Study*, while it received a 21 share and a 55 net weekly circulation in noncable homes in Alcona County. For purposes of comparison, according to Arbitron's 1993 study *Television County Coverage: Michigan*, WNEM-TV received a combined (cable and off-air) 17 share and a 51 net weekly circulation in Alcona County and an 8 share and a 40 net weekly circulation in Lapeer County. It had an off-air share of 19 share and a 43 net weekly circulation in Alcona County, and in Lapeer County, the station received a 6 share and a 38 net weekly circulation off-air. We recognize that this data is county-wide, rather than community-specific. However, we have previously stated that we will accept such data as probative, although not conclusive, in cases of this type, absent evidence that such data are not fairly reflective of viewing in the actual communities in questions. *See, RKZ Television, Inc.*, 8 FCC Rcd 8008, 8010 (1993).

[16] MM Docket 92-259, 8 FCC Rcd at 2977.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Cox Cable Greater Hartford, Inc.	CT0031, CT0032, CT0033, CT0128
Cox Cable Quad Cities	IA0030, IA0031, IL0105, IL0106 IL0107
Cox Cable Oklahoma City	OK0187

Benchmark Filings To Support
Cable Programming Service Prices

MEMORANDUM OPINION AND ORDER

Adopted: February 21, 1995; Released: February 23, 1995

By the Deputy Chief, Cable Services Bureau:

1. Here we consider complaints about the prices Cox Cable Greater Hartford, Inc., Cox Cable Quad Cities, and Cox Cable Oklahoma City ("Cox Cable") was charging for its cable programming service ("CPS") tier in several locations as captioned above.[1] Cox Cable has chosen to attempt to justify its prices through benchmark showings on FCC Form 393. This Order addresses the reasonableness of Cox Cable's prices only through May 14, 1994. At a later time we will issue a separate order addressing the reasonableness of the prices after that date.[2]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[3] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a complete and timely complaint. The filing of a complete and timely complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[4] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[5] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[6]

3. The Commission's original rate regulations took effect on September 1, 1993.[7] The Commission subsequently revised its rate regulations effective May 15, 1994.[8] Operators with complete and timely CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[9] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[10] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[11]

4. Cox Cable Oklahoma City, Cox Cable Quad Cities, and Cox Cable Greater Hartford, Inc. all assert that their monthly CPS prices are justified by their benchmark filings because these prices are less than the maximum permitted charges as calculated in their filings. Upon review, we have found no apparent errors that would result in Cox Cable's CPS tier prices exceeding its maximum permitted CPS prices.[12]

5. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the complaints referenced herein against the cable programming service prices charged by Cox Cable Greater Hartford, Inc., Cox Cable Quad Cities, and Cox Cable Oklahoma City ARE DENIED TO THE EXTENT INDICATED HEREIN.

6. IT IS FURTHER ORDERED that the benchmark filing submitted by Cox Cable Greater Hartford, Inc., CUID Nos. CT0031, CT0032, CT0033, and CT0128, for the period September 1, 1993 to May 14, 1994, justifies a price of $13.99 per month (plus franchise fee) for the cable programming service tier; that the benchmark filing submitted by Cox Cable Quad Cities for CUID Nos. IA0031, IA0030, IL0105, IL0106, and IL0107 for the period September 1, 1993 to May 14, 1994 justifies a price of $11.78 (plus franchise fee) for the cable programming service tier; and that the benchmark filing submitted by Cox Cable

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[1] According to Cox Cable, each set of Community Unit Identification (CUID) numbers grouped together in the above caption constitutes a single cable system and has the same programming and rates.

[2] The findings in this Order do not in any way prejudge the reasonableness of the prices for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Cox Cable has sought to take advantage of the refund deferral period under the Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (*"Second Order on Reconsideration"*), the maximum permitted CPS prices determined herein might also apply from May 15, 1994 until the date on which Cox Cable implemented its CPS price under the new regulations. *See* para. 3, *infra*.

[3] Pub. L. No. 102-385, 106 Stat. 1460 (1992) ("1992 Cable Act"); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[4] 47 C.F.R. § 76.956.

[5] 47 C.F.R. § 76.956(b).

[6] *Id.*

[7] Order in MM Docket No. 92-266, Implementation of Sections of the Cable Consumer Protection and Competition Act of 1992: Rate Regulation, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[8] 47 C.F.R. § 76.922(b).

[9] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[10] *Id.*

[11] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[12] This finding is based solely on the representations of Cox Cable. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

Oklahoma City for CUID No. OK0187 for the period September 1, 1993 to May 14, 1994 justifies a price of $13.59 (plus franchise fee) for the cable programming service tier.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Deputy Chief, Cable Service Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
February 21, 1995

Released: February 23, 1995

VIA FACSIMILE AND FIRST CLASS U.S. MAIL

Steven J. Horwitz, Esq.
Cole, Raywid & Braverman, L.P.
Second Floor
1919 Pennsylvania Ave., NW
Washington, DC 20006-3458

Re: FCC Form 1210 rate increases for United Cable Television of East San Fernando Valley, Ltd.

Dear Mr. Horwitz:

On January 19, 1995, United Cable Television of East San Fernando Valley, Ltd. (United") filed with the Cable Services Bureau a request for approval, on an expedited basis, of a proposed rate increase to its cable programming service (CPS) tier as computed on FCC Form 1210. In this request, United states that the increase is necessary to allow United to provide its subscribers with new programming. Because we found United's rates to be unreasonable, obligating it to pay refunds to its CPS subscribers,[1] United must obtain the Bureau's approval before it may increase its CPS tier rate. *See* FCC Form 1210, page 2.[2] This requirement allows us to monitor subsequent rate increases, once we have found rates unreasonable.

To date, we have undertaken a full review of the CPS rates of United of East San Fernando Valley only for the period prior to May 15, 1994, and have found those rates unreasonable. Our review of the reasonableness of United's rates from May 15, 1994 to the present is currently underway. United's current request for approval of FCC Form 1210 is for expenses incurred in the fourth quarter of 1994, and programming expenses to be accrued upon our approval.

We have reviewed the Form 1210 filings before us, and find no patent defects. We believe that the impetus behind United's request is to provide its subscribers with new programming, and that approval of United's instant request will encourage this development. Our permitting the requested increases is on an interim basis only, and is subject to our determination of the reasonableness of United's CPS rates for the period beginning May 15, 1994, including subsequent changes to the rates filed on United's FCC Form 1200. Thus, although we allow the requested increase for new programming and external costs, the increased rate which United may charge is potentially subject to refund if our review of United's FCC Form 1200 and Form 1210 filings finds that United's underlying CPS rate is unreasonable.

Sincerely,

Gregory J. Vogt
Deputy Chief, Cable Services Bureau

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[1] *See* Order, DA 94-1286 (Cab. Serv. Bur., released Nov. 18, 1994).

[2] We note Dimension's argument that a refund liability for a past period does not constitute a finding that the operator's rates *are* unreasonable. We rely, however, on the broader interpretation permitted by the first sentence, "If the Commission found your rates to be unreasonable less than one year ago and you now wish to increase your rates...." We did find Dimension's rates unreasonable less than one year ago, and Dimension is accordingly correct in filing an FCC Form 1210 for approval of its proposed rate increase.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

NewChannels Corporation	CUID Nos. NY0064, NY0067, NY1016 NY1017, NY1018,
Carthage, New York System	NY1019 and NY1437

Order Denying Jurisdiction

MEMORANDUM OPINION AND ORDER

Adopted: February 21, 1995; Released: February 23, 1995

By the Deputy Chief, Cable Services Bureau:

1. In this Order we dismiss complaints against the prices NewChannels Corporation ("NewChannels") was charging for its cable programming service ("CPS") tiers in the its Carthage, New York System CUID Nos. NY0064, NY0067, NY1016, NY1017, NY1018, NY1019 and NY1437 on the grounds that the complaints concern rates that are outside the jurisdiction and authority of this Commission. As explained below, the Commission regulates rates for CPS only, and then only upon filing of a valid complaint. Our review reveals that the complaints filed against NewChannels, while asserting that they challenge CPS rates, challenge only rates for basic service, not for CPS. The complaints therefore do not trigger the Commission's jurisdiction, and they are accordingly dismissed.

2. The Cable Television Consumer Protection and Competition Act of 1992 ("Cable Act of 1992")[1] distinguishes among basic cable service, premium cable service, and cable programming service.[2] The basic service tier is the minimum package of cable service that a consumer can buy. Except in limited circumstances, the Commission does not have jurisdiction over rates for the basic service tier, and cannot act upon complaints concerning rates for that tier. Premium cable service consists of channels that are paid for individually (per-channel) or per-program. By statute, these channels are not subject to rate regulation.[3] CPS includes all video programming that is not on the basic service tier which the operator offers as a package of channels. Rates for CPS tiers are subject to regulation by the Commission in response to a valid complaint.

3. The complaints under consideration here were filed with the Commission on FCC Form 329. FCC Form 329 is used by subscribers or local franchising authorities wishing to lodge with the Commission a complaint about an operator's CPS rates. The form is entitled "Cable Programming Service Rate Complaint." While the form is designed for use in challenging CPS tier rates, the definition of CPS tier rates is not made clear on the face of the form and it is possible that someone might complete the form without understanding the difference between basic tier rates, premium service rates, and CPS tier rates.[4]

4. We have examined the complaints, and we conclude that the complaints challenge only basic rates, not CPS rates. Although the complainants indicate that the rates challenged violate the Commission's rules, the specific information provided by the complainants indicates that only basic rates are at issue. When only basic rates are being challenged, the complaint should properly be brought to the attention of the local franchising authority in the first instance, and not filed with this Commission. If the complaints do in fact challenge CPS rates, the complainants may file a petition for reconsideration providing information adequate to support their challenge.

5. Accordingly, IT IS ORDERED, pursuant to Section 623(a)(2)(A) and (B) of the Communications Act of 1934, as amended, 47 U.S.C. § 543(a)(2)(A) and (B), that the complaints filed prior to May 14, 1994 against the cable programming service prices charged by NewChannels Corporation in its Carthage, New York System, CUID Nos. NY0064, NY0067, NY1016, NY1017, NY1018, NY1019 and NY1437, ARE DISMISSED.

6. This action is taken pursuant to delegated authority under Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Deputy Chief, Cable Services Bureau

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[1] Cable Television Consumer Protection and Competition Act, Pub. L. No. 102-385, 106 Stat. 1460 (1992) (Cable Act of 1992).

[2] Cable Act of 1992, Section 602, 47 U.S.C. § 522.

[3] Cable Act of 1993, Section 623(a)(a), 47 U.S.C. §543(a)(1).

[4] We note that operators have great latitude in determining what channels will be included in the basic tier; once the statutory minimum (broadcast and public educational and governmental access channels) is met, the operator may include as many additional channels in the basic tier as it wants, or it may move additional channels to a higher tier. Thus it is possible that a complainant might not clearly understand which channels are part of which tier.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	
New Channels Corporation	CUID Nos. NY0433, NY1144, NY1169, NY1170, NY1619, NY1624
Benchmark Filing to Support Cable Programming Service Price	NY0107, NY0110, NY0111, NY0927, NY0916, NY0909, NY1531
	AL0141, AL0143, AL0144, AL0145, AL0146, AL0174, AL0199
	AL0245, AL0019, AL0092, AL0048, AL0089, AL0090, AL0091
	PA2303, PA2614, PA2681, PA2682

MEMORANDUM OPINION AND ORDER

Adopted: February 21, 1995; Released: February 23, 1995

By the Deputy Chief, Cable Services Bureau:

I. INTRODUCTION

1. Here we consider complaints about the prices NewChannels Corporation ("NewChannels"), through its subsidiary companies as shown on Appendix A, was charging for its cable programming service ("CPS") tier in the communities designated by the CUID numbers referenced above and on Appendix A. NewChannels has attempted to justify its prices through benchmark showings on FCC Form 393. This Order addresses the reasonableness of NewChannels's prices only through May 14, 1994. At a later time we will issue a separate Order addressing the reasonableness of the prices after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators0 must use the FCC Form 1200 series.[10]

II. PROCEDURAL MATTERS

4. The first complete and timely CPS complaint in each of the franchise areas addressed herein was completed and served on NewChannels and filed with the Commission on the dates as set forth in Appendix A.

5. NewChannels attempted to justify its CPS prices through Forms 393 filed and amended[11] on the dates set forth on Appendix B.

III. DISCUSSION

6. NewChannels asserts that its monthly CPS tier prices per subscriber as shown on Appendix C are justified by its benchmark filings because its prices are equal to (or below) the maximum permitted charges calculated in NewChannels' Form 393 filings. Upon review of NewChannels Forms 393, we have found no apparent errors that result in NewChannels CPS tier prices exceeding its maximum permitted prices.

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[1] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent NewChannels has sought to take advantage of the refund deferral period under the *Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking*, MM Docket No. .92-266, FCC 94-38, 9 FCC Rcd 4119 (1994) (*"Second Order on Reconsideration"*), the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which NewChannels implemented its CPS prices under the new regulations. *See* para. 3, *infra*.

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] *Order* in MM Docket No. 92-266, *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration* at 4189, n.195.

[11] NewChannels amended its FCC Forms 393 in response to an Order citing common deficiencies observed in benchmark filings generally. *See Cable Operators' Rate Justification Filings*, DA 94-52 (released May 23, 1994).

IV. CONCLUSIONS

7. Upon review of the record herein, we conclude that New Channels has demonstrated that its CPS tier prices as shown on Appendix C (plus franchise fee) were equal to or below the maximum reasonable CPS tier prices for the period from the filing of the earliest complaint in each franchise area (as shown on Appendix A) to May 14, 1994.[12]

8. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the complaints referenced on Appendix A against the cable programming service prices charged by NewChannels Corporation (as shown on Appendix A), and all other complaints in these franchise areas relating to the same price, ARE DENIED TO THE EXTENT INDICATED HEREIN.

9. IT IS FURTHER ORDERED that the benchmark filings submitted by NewChannels and its subsidiary companies with respect to the franchise areas set forth on Appendix A for the period from the filing of the earliest complaint in each franchise area (as shown on Appendix A) to May 14, 1994, justify the prices shown on Appendix C (plus franchise fee) for New Channels Corporation's cable programming service tier.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Deputy Chief, Cable Services Bureau

Appendix A

CUID No.	Date First Complaint Filed With FCC	Date Complaint Served
NY0433 Fulton	1/4/94	12/30/93
NY1144 Fulton	1/21/94	12/30/93
NY1169 Fulton	12/27/93	12/22/93
NY1170 Fulton	12/27/93	12/16/93
NY1619 Fulton	1/18/94	12/23/93
NY1624 Fulton	12/27/93	12/20/93
NY0107 Corning	1/31/94	1/19/94
NY0110 Corning	1/31/94	1/17/94
NY0111 Corning	1/31/94	1/19/94
NY0909 Corning	1/27/94	1/17/94
NY0916 Corning	1/18/94	1/13/94
NY0927 Corning, NY	1/31/94	1/17/94
NY1531 Corning, NY	1/31/94	1/24/94
AL0141 Wetempka	1/5/94	12/27/93
AL0143 Eclectic	1/3/94	12/30/93
AL0144 Coosada	1/3/94	12/27/93
AL0145 Tallassee	1/5/94	12/26/94
AL0146 Elmore	1/27/94	1/24/94
AL0174 Montgomery	1/3/94	12/30/93
AL0199 Millbrook	1/3/94	12/27/93
AL0245 Anniston	1/24/94	1/12/94
AL0019 Anniston	1/24/94	1/14/94
AL0092 Anniston	1/27/94	1/14/94
AL0093 Anniston	1/24/94	1/14/94
AL0048 Anniston	1/27/94	1/14/94
AL0089 Anniston	1/24/94	1/14/94
AL0090 Anniston	1/26/94	1/12/94
AL0091 Anniston	1/24/94	1/19/94
PA2303 Susquehanna County	12/28/93	12/21/93
PA2614 Susquehanna County	12/28/93	12/21/93
PA2681 Susquehanna County	12/28/93	12/21/93
PA2682 Susquehanna County	12/30/93	12/21/93

[12] This finding is based solely on the representations of New Channels listed in paragraph 5, *supra*. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

Appendix B

CUID No.	Date 393 Filed With FCC	Date of Amended 393 Filing
NY0433	2/4/94	7/5/94
NY1144	2/4/94	7/5/94
NY1169	2/4/94	7/5/94
NY1170	2/4/94	7/5/94
NY1619	2/4/94	7/5/94
NY1624	2/4/94	7/5/94
NY0107	2/4/94	7/5/94
NY0110	2/4/94	7/5/94
NY0111	2/4/94	7/5/94
NY0909	2/4/94	7/5/94
NY0916	2/4/94	7/5/94
NY0927	2/4/94	7/5/94
NY1531	2/4/94	7/5/94
AL0141	2/10/94	7/5/94
AL0143	2/10/94	7/5/94
AL0144	12/27/93	7/5/94
AL0145	2/10/94	7/5/94
AL0146	2/10/94	7/5/94
AL0174	2/10/94	7/5/94
AL0199	2/10/94	7/5/94
AL0245	2/15/94	7/5/94
AL0019	2/14/94	7/5/94
AL0092	2/16/94	7/5/94
AL0093	2/14/94	7/5/94
AL0048	2/14/94	7/5/94
AL0089	2/14/94	7/5/94
AL0090	2/14/94	7/5/94
AL0091	2/14/94	7/5/94
PA2303	2/15/94	7/5/94
PA2614	2/14/94	7/5/94
PA2681	2/14/94	7/5/94
PA2682	2/14/94	7/5/94

Appendix C

CUID NO.	CPS Tier Price
NY0433	$15.02
NY1144	$15.02
NY1169	$15.02
NY1170	$15.02
NY1619	$15.02
NY1624	$15.02
NY0107	$12.50
NY0110	$12.50
NY0111	$12.50
NY0909	$12.50
NY0916	$12.50
NY0927	$12.50
NY1531	$12.50
AL0141	$13.86
AL0143	$13.86
AL0144	$13.86
AL0145	$13.86
AL0146	$13.86
AL0174	$13.48
AL0199	$13.48
AL0245	$13.48
AL0019	$13.48
AL0092	$13.48
AL0093	$13.48
AL0048	$13.48
AL0089	$13.48
AL0090	$13.48
AL0091	$13.48
PA2303	$11.76
PA2614	$11.76
PA2681	$11.76
PA2682	$11.76

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

NewChannels Corporation Rome, New York	CUID Nos. NY0059, NY0921, NY1021, NY1138, NY1139, NY1193, NY1378, NY1379 and NY1380

Benchmark Filing To Support
Cable Programming Service Price

MEMORANDUM OPINION AND ORDER

Adopted: February 21, 1995; Released: February 23, 1995

By the Deputy Chief, Cable Services Bureau:

I. INTRODUCTION

1. Here we consider complaints about the price NewChannels Corporation ("NewChannels") was charging for its cable programming service ("CPS") tier in CUID Nos. NY0059, NY0921, NY1021, NY1138, NY1139, NY1193, NY1378, NY1379 and NY1380. NewChannels has chosen to attempt to justify its price through a benchmark showing on FCC Form 393. This Order addresses the reasonableness of NewChannels's price only through May 14, 1994. At a later date we will issue a separate order addressing the reasonableness of the price after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

II. PROCEDURAL MATTERS

4. The first CPS complaint was completed and served on NewChannels on December 22, 1993.[11] The Commission received the complaint on January 3, 1994.

5. NewChannels attempted to justify its CPS price through FCC Form 393's filed on February 4, 1994. NewChannels amended its justifications on July 5, 1994, in response to a Cable Services Bureau Order citing common deficiencies observed in benchmark filings generally,[12] and on February 7, 1995, in response to a Cable Services Bureau Public Notice offering operators the opportunity to make optional supplemental filings.[13]

III. DISCUSSION

6. NewChannels asserts that its monthly CPS tier price of $12.56 per subscriber is justified by its benchmark filing because its price is equal to the maximum permitted charge of $12.56 as calculated in the filing. Upon review of NewChannels's Form 393, we have found no apparent errors that would require a recalculation of NewChannels's maximum permitted CPS price.

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[1] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent NewChannels has sought to take advantage of the refund deferral period under the *Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking*, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (*"Second Order on Reconsideration"*), the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which NewChannels implemented its CPS price under the new regulations. *See* para. 3, *infra*.

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] *Order* in MM Docket No. 92-266, *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[11] The complaint was dated December 22, 1993 and states that it was mailed to NewChannels on that date. NewChannels has not complied with 47 C.F.R. § 76.956(a), which requires it to state when service occurred. Under these circumstances we will consider December 22, 1993 as the service date.

[12] *Cable Operators' Rate Justification Filings*, DA 94-526, 9 FCC Rcd 7752 (Cab. Serv. Bur. 1994).

[13] *Public Notice: Cable Services Bureau Announces Optional Procedures with Respect to Pending Pre-May 15 Benchmark Cases*, DA 94-1556 (Dec. 29, 1994); *see also Public Notice: Cable Services Bureau Announces Extension of Time to File Under Optional Procedures Plan with Respect to Pending Pre-May 15 Benchmark Cases*, DA 95-87 (Jan. 20, 1995).

IV. CONCLUSIONS

7. Upon review of the record herein, we conclude that NewChannels has demonstrated that $12.56 per month (plus franchise fee) was the maximum reasonable CPS tier price for the period January 3, 1994 to May 14, 1994.[14]

8. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the December 22, 1993 complaint against the cable programming service price charged by NewChannels Corporation in Rome, New York, CUID Nos. NY0059, NY0921, NY1021, NY1138, NY1139, NY1193, NY1378, NY1379 and NY1380, and all other complaints relating to the same price, ARE DENIED TO THE EXTENT INDICATED HEREIN.

9. IT IS FURTHER ORDERED that the benchmark filing submitted by NewChannels Corporation with respect to Rome, New York CUID Nos. NY0059, NY0921, NY1021, NY1138, NY1139, NY1193, NY1378, NY1379 and NY1380, for the period of January 3, 1994 to May 14, 1994, justifies a maximum price of $12.56 per month (plus franchise fee) for NewChannels Corporation's cable programming service tier.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Deputy Chief, Cable Services Bureau

[14] This finding is based solely on the representations of NewChannels listed in paragraph 5, *supra*. Should information come to our attention that these representations (including representations as to data regarding installations and customer equipment) were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Cablevision Industries CUID No. FL0264
Volusia County, Florida

Benchmark Filing to Justify Cable
Programming Service Rates

MEMORANDUM OPINION AND ORDER

Adopted: February 21, 1995; Released: February 23, 1995

By the Deputy Chief, Cable Services Bureau:

1. Here we consider complaints about the price Cablevision Industries ("CVI") was charging for its cable programming service ("CPS") tier in Volusia County, Florida, CUID No. FL0264. CVI has chosen to attempt to justify its price through a benchmark showing on FCC Form 393. This order addresses the reasonableness of CVI's price only through May 14, 1994. At a later time we will issue a separate order addressing the reasonableness of the price after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a complete and timely complaint. The filing of a complete and timely complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with complete and timely CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

4. CVI asserts that its monthly CPS price is justified by its benchmark filing because this price is less than the maximum permitted charge. Upon review, we have found no apparent errors that would require a recalculation of CVI's maximum permitted CPS price.[11]

5. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the complaints referenced herein against the cable programming service price charged by Cablevision Industries in Volusia County, Florida, CUID No. FL0264 ARE DENIED TO THE EXTENT INDICATED HEREIN.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Deputy Chief, Cable Service Bureau

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[1] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent CVI has sought to take advantage of the refund deferral period under the Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (*"Second Order on Reconsideration"*), the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which CVI implemented its CPS price under the new regulations. *See* para. 3, *infra*.

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992) ("1992 Cable Act"); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] Order in MM Docket No. 92-266, Implementation of Sections of the Cable Consumer Protection and Competition Act of 1992: Rate Regulation, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[11] This finding is based solely on the representations of CVI. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Cablevision Industries — CUID No. CA0161
Long Beach, California

Benchmark Filings to Support
Cable Programming Service Prices

MEMORANDUM OPINION AND ORDER

Adopted: February 21, 1995; Released: February 23, 1995

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. Here we consider complaints about the price Cablevision Industries ("CVI") was charging for its cable programming service ("CPS") tier in Long Beach, California, CUID No. CA0161. CVI has chosen to attempt to justify its price through a benchmark showing on FCC Form 393. This Order addresses the reasonableness of CVI's price only through May 14, 1994. At a later date we will issue a separate order addressing the reasonableness of the prices after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review a cable operator's prices for its cable programming service ("CPS") tier upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

II. PROCEDURAL MATTERS

4. The first valid CPS complaint in the franchise area addressed by this Order was completed and served on CVI on September 3, 1993 and received by the Commission on September 9, 1993.

5. CVI filed its first FCC Form 393 on November 18, 1993. CVI subsequently amended its Form 393 filing on June 27, 1994.

III. DISCUSSION

6. CVI asserts that its monthly CPS tier price per subscriber of $7.65 is justified by its benchmark filing because its price is within the maximum permitted rate as calculated in the filing.[11] Upon review of CVI's FCC Form 393, we have found the following errors that require a recalculation of CVI's maximum permitted CPS price:

> a. On September 1, 1993, CVI restructured its rates. As part of this restructuring, CVI reduced its CPS price from $14.00 to $7.65 and increased its basic programming tier price from $12.95 to $13.95. This change, however, is not reflected on Line 101 of Worksheet 1 of Part II of CVI's FCC Form 393. Instead of entering its currently effective tier prices, as required by the directions for Line 101, CVI entered its previously effective tier prices. On Line 101, CVI should have entered $13.95 instead of $12.95 as its basic service tier price and $7.65 instead of $14.00 as its CPS tier price.

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[1] The findings in this Order do not in any way prejudge the reasonableness of the prices for CPS service after May 14, 1994 under our new rate regulations. However, to the extent CVI has sought to take advantage of the refund deferral period under the *Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking*, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (1994) (*"Second Order on Reconsideration"*), the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which CVI implemented its CPS prices under the new regulations. *See* para. 3, *infra*. Further, to the extent that the price for the period ending May 14, 1994 is found to be excessive, reductions in CVI's prices for the period after May 14, 1994 may be required to reflect the fact that CVI's price during the earlier period, which is used as the starting point to calculate its prices for the prospective period, was unreasonable. *See* 47 C.F.R. § 76.922(b)(4)(C).

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] *Order* in MM Docket No. 92-266, *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[11] However, CVI's June 27, 1994 filing shows that while CVI's current price for its CPS tier (not including franchise fee) is $7.65, CVI's own calculation of its maximum permitted CPS tier price is $7.63.

b. Since CVI restructured its rates, including its equipment rates, on September 1, 1993, the current monthly equipment revenue figure it entered on Part II, Worksheet 1, Line 104 should have been close or identical to its equipment cost figure on Part III, Step G, Line 34.[12] However, CVI's entries on these two lines varied substantially. Accordingly, on Line 104 we enter $242,559.83, which is the identical figure that is on Part III, Step G, Line 34.

7. Because of these errors, we conclude that CVI has failed to demonstrate that its price for the CPS tier was not unreasonable. We will therefore set a price for this tier, incorporating the adjustments discussed above. In doing so we must also recalculate the Inflation Adjustment Factor in Form 393, Part II, Worksheet 1. On its Form 393, CVI apparently calculated the Inflation Adjustment Factor using the data it relied on when it set its CPS price. If based on this data, Form 393 indicated that CVI's price was reasonable, then CVI would have successfully justified its price under paragraph 94 of the *Third Order on Reconsideration*.[13] However, CVI has not shown that its price was reasonable, so we must recalculate the Inflation Adjustment Factor on the basis of the most accurate data currently available for the latest date contemplated by the Form 393 instructions.[14] On July 29, 1994, the Department of Commerce released corrected inflation data including Gross National Product Price Index ("GNP-PI") figures of 122.3 for the third quarter of 1992, 126.5 for the fourth quarter of 1993, and 127.5 for the first quarter of 1994. Using these GNP-PI figures, we calculate an Inflation Adjustment Factor of 1.028 through September 1993.

8. These adjustments have the cumulative effect of reducing the maximum permitted monthly CPS tier price from $7.63 (as CVI calculated) to $7.56.

IV. CONCLUSIONS

9. Upon review of the record herein, we conclude that CVI's showing supports a maximum reasonable CPS tier price for this franchise area of $7.56 (plus franchise fee) for the period from September 9, 1993 to May 14, 1994.[15] We further determine that we will order appropriate refunds pursuant to Section 76.957 of the Commission's Rules, 47 C.F.R. § 76.957, in order to reimburse subscribers for the amount they paid in excess of a reasonable price.

10. We further conclude that CVI must reflect in its FCC Form 1200 rate filing for the period after May 14, 1994 the fact that CVI's price during the earlier period was unreasonable.[16] We reserve the right to make further adjustments to CVI's price for the period after May 14, 1994, upon completion of our review of CVI's FCC Form 1200 rate filing.

11. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the September 3, 1993 complaints against the cable programming service tier price charged by Cablevision Industries in Long Beach, California, CUID No. CA0161 and all other complaints in this franchise area related to the same price, ARE GRANTED TO THE EXTENT INDICATED HEREIN.

12. IT IS FURTHER ORDERED that the benchmark filing submitted by Cablevision Industries with respect to Long Beach, California, CUID No. CA0161, for the period from September 9, 1993 to May 14, 1994, justifies a maximum price of $7.56 (plus franchise fee) for Cablevision Industries' cable programming service tier.

13. IT IS FURTHER ORDERED, pursuant to Section 76.961 of the Commission's Rules, 47 C.F.R. § 76.961, that Cablevision Industries shall refund to subscribers that portion of the amounts paid for cable programming service for the period September 9, 1993[17] to May 14, 1994 which exceeded $7.56 (plus franchise fee) per month and was thus unreasonable, plus interest to the date of the refund.

14. IT IS FURTHER ORDERED that Cablevision Industries shall promptly determine the overcharges to CPS subscribers for the stated period, and shall within 30 days of the release of this Order file a report with the Chief, Cable Services Bureau, stating the cumulative refund amount so determined (including franchise fees and interest), describing the calculation thereof, and describing its plan to implement the refund within 60 days of Commission approval thereof.

15. IT IS FURTHER ORDERED, pursuant to Section 76.922(b)(4)(C) of the Commission's Rules, 47 C.F.R. § 76.922(b)(4)(C), that Cablevision Industries shall, within 30 days of the release of this Order, revise its Form 1200 filing with respect to Long Beach, California for the period beginning May 15, 1994, to reduce the monthly charge for Tier 2 (Line A6b) to equal the maximum permitted price in this franchise area (plus franchise fee).

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[12] *See Questions and Answers on Completion of FCC Form 393 and Associated Filing Requirements*, Question and Answer No. 7 (released Nov. 10, 1993) ("Where operators have restructured equipment rates as of September 1, 1993 in accordance with our regulations . . . operators will enter on Line 104 the same, or nearly the same, number as on Line 301.").

[13] *Third Order on Reconsideration*, MM Docket Nos. 92-266 and 92-262, FCC 94-40, 9 FCC Rcd 4316, 4348 (1994).

[14] *See* 47 C.F.R. § 76.922(b)(9)(iii) (if a cable operator fails to justify its rates, rates must be adjusted in accordance with the most accurate data available at the time of analysis). The instructions to FCC Form 393, page 11, require that the Inflation Adjustment Factor be calculated using "the number of whole months from September 30, 1992 to the date you will submit this form." In general, a cable operator must submit a justification of its rates no more than 30 days after service of the earliest valid complaint. 47 C.F.R. § 76.956(a). The Inflation Adjustment Factor therefore must be calculated as if CVI had filed Form 393 within this 30 day period.

[15] This finding is based solely on the representations of CVI listed in paragraph 5, *supra*, and the modifications described in paragraphs 6 and 7, *supra*. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

[16] We reviewed CVI's FCC Form 1200 rate filing and confirmed that CVI calculated its rates for the period after May 14, 1994 using the rates that we find in this Order to be unreasonable.

[17] Our jurisdiction to order a refund dates from the earliest date a valid complaint is filed with the Commission.47 C.F.R. § 76.961(b).

16. IT IS FURTHER ORDERED that Cablevision Industries shall place into effect, within 30 days after its submission of the revised Form 1200 filing required above, a price for the cable programming service tier that reflects the reduction in the CPS rate determined in this Order.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Cablevision Industries CUID No. CA0833
Los Angeles, California

Benchmark Filing to Justify Cable
Programming Service Rates

MEMORANDUM OPINION AND ORDER

Adopted: February 21, 1995; Released: February 23, 1995

By the Deputy Chief, Cable Services Bureau:

1. Here we consider complaints about the price Cablevision Industries ("CVI") was charging for its cable programming service ("CPS") tier in Los Angeles, California, CUID No. CA0833. CVI has chosen to attempt to justify its price through a benchmark showing on FCC Form 393. This order addresses the reasonableness of CVI's price only through May 14, 1994. At a later time we will issue a separate order addressing the reasonableness of the price after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a complete and timely complaint. The filing of a complete and timely complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with complete and timely CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

4. CVI asserts that its monthly CPS price is justified by its benchmark filing because this price is less than the maximum permitted charge. Upon review, we have found no apparent errors that would require a recalculation of CVI's maximum permitted CPS price.[11]

5. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the complaints referenced herein against the cable programming service price charged by Cablevision Industries in Los Angeles, California, CUID No. CA0833 ARE DENIED TO THE EXTENT INDICATED HEREIN.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Deputy Chief, Cable Service Bureau

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[1] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent CVI has sought to take advantage of the refund deferral period under the Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (*"Second Order on Reconsideration"*, the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which CVI implemented its CPS price under the new regulations. *See* para. 3, *infra*.

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992) ("1992 Cable Act"); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] Order in MM Docket No. 92-266, Implementation of Sections of the Cable Consumer Protection and Competition Act of 1992: Rate Regulation, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[11] This finding is based solely on the representations of CVI. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: February 22, 1995

WIRELESS TELECOMMUNICATIONS BUREAU SEEKS COMMENT ON VERMONT TELEPHONE COMPANY, INC.'S REQUEST FOR DECLARATORY RULING ON APPOINTMENTS OF ALIENS AS DIRECTOR AND SENIOR VICE PRESIDENTS OF PARENT CORPORATION

On February 3, 1995, Vermont Telephone Company, Inc. ("VTC") requested a Declaratory Ruling pursuant to section 1.2 of the Commission's Rules that, consistent with the public interest, Mr. Noel Bambrough, a Canadian citizen, may serve on the board of directors of VTC's parent company. Vermont National Telephone Company, Inc. ("Vermont National"). In addition, VTC seeks approval to appoint Messrs. Bambrough and Switzer (also a Canadian citizen) as senior vice presidents of Vermont National. Currently, all of the officers of Vermont National are United States citizens, and one of the four directors is a Canadian citizen. If the subject appointments are approved two officers and two directors of Vermont National, the parent of the licensee, would be Canadian citizens. Vermont National controls, but does not directly hold, Commission wireless narrowband commercial radio licenses and therefore the Commission has statutory authority under Section 310(b)(4) of the Communications Act to determine whether or not it is contrary to the public interest for these appointments to be made.

The Wireless Telecommunications Bureau is reviewing VTC's request to determine whether Messrs. Bambrough and Switzer should be permitted to serve as senior vice presidents, and whether Mr. Bambrough should be permitted to serve on the board of directors of Vermont National. To assist us in this determination, the Bureau solicits comments on VTC's request for a Declaratory Ruling. Comments should be filed on or before March 8, 1995. Comments should be addressed to: Legal Branch, Commercial Radio Division, Wireless Telecommunications Bureau, Room 5202, STOP 2000C2, Federal Communications Commission, Washington, D.C. 20554. Copies of the above-referenced filings may be obtained from the Commission's copy contractor, ITS, Inc., 2100 M Street, N.W., Suite 140, (202) 857-3800. Copies are also available for public inspection in Room 5202, 2025 M Street, N.W., Washington, D.C. 20554.

For further information contact Lisa Warner in the Commercial Radio Division, Legal Branch at (202) 418-0620.

FEDERAL COMMUNICATIONS COMMISSION

PUBLIC NOTICE

FEDERAL COMMUNICATIONS COMMISSION
1919 M STREET N.W.
WASHINGTON, D.C. 20554

News media information 202/632-5050. Recorded listing of releases and texts 202/632-0002.

DA 94-1562

December 21, 1994

WIRELESS TELECOMMUNICATIONS BUREAU ISSUES CLARIFICATION CONCERNING FINANCIAL SHOWING OF CELLULAR RADIO APPLICANTS FOR UNSERVED AREAS

Report No. CL-95-32

In response to a request for clarification from Thomas Gutierrez, Esq., the Commercial Radio Division, Wireless Telecommunications Bureau has issued the attached letter specifying what is required of a cellular radio applicant for an unserved area whose firm financial commitment expires prior to grant of the applicant's authorization. The letter states, consistent with our policy for cellular radio applicants in the RSAs, that such an applicant must submit an updated commitment within 30 days of the date of the public notice announcing its status as a tentative selectee or sole applicant for the unserved area. See, FCC News Release of July 19, 1989, No. 3690 and attached letter from the Chief, Common Carrier Bureau to A. Thomas Carroccio, Esq. The applicant must demonstrate that the firm financial commitment is available for a minimum period of six months from the date of the referenced public notice; no further renewal of the commitment will be required.

--FCC--

FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

December 21, 1994

In Reply Refer To:
1600D-BG

Thomas Gutierrez, Esq.
Lukas, McGowan, Nace & Gutierrez, Chartered
1111 Nineteenth Street, N.W.
Suite 1200
Washington, D.C. 20036

Dear Mr. Gutierrez:

This is in response to your letter of December 8, 1994, in which you request clarification of the Commission's Rules concerning the financial showing required of cellular radio applicants for unserved areas, as set forth in Section 22.917(f) of the Commission's Rules.

Your letter explains that several of your clients are lottery winners in the unserved area lottery conducted by the Commission on November 21, 1994. You observe that your clients' applications were filed in the spring of 1993 and that many of the financial commitments included in those applications have expired. In this light, you seek clarification as to whether Section 22.917(f) of the Commission's Rules, which governs financial commitment obligations of initial unserved area applicants, requires cellular unserved area applicants to renew the financial commitment letters included in their initial applications.

Section 22.917(f)(1) of the Commission's Rules requires a cellular unserved area applicant to demonstrate that it has a firm financial commitment at the time its application is filed. As you have noted, the rule is silent as to the Commission's policy in the event that the firm financial commitment expires prior to grant of an authorization. Due to processing delays resulting from a variety of factors, these commitments may expire prior to grant. Further, the costs associated with renewing the firm financial commitment may place a financial burden on an applicant.

Consistent with the Commission's policy concerning the firm financial commitment for cellular applicants in the Rural Service Areas (RSAs) (see FCC News Release of July 19, 1989, Mimeo No. 3690, and attached letter from the Chief, Common Carrier Bureau, to A. Thomas Carroccio, Esq., dated July 14, 1989), a cellular applicant for an unserved area whose firm financial commitment expires prior to grant of the applicant's authorization must submit an updated commitment within 30 days of the date of public notice announcing its status as a tentative selectee or sole applicant in the market. Such an applicant must be capable of demonstrating a firm financial commitment for a minimum period of six months from the date

of the public notice announcing that the applicant is a tentative selectee. No further renewal of the financial commitment will be required. This need to submit only one updated commitment by the tentative selectee is consistent with the Commission's firm financial commitment requirements, which are designed to ensure the sincerity of the applicants, the ready availability of funds once a construction authorization is granted, and the provision of prompt service to the public.

Sincerely yours,

Rosalind K Allen

Rosalind K. Allen
Acting Chief, Commercial Radio Division
Wireless Telecommunications Bureau

DA 94-1563

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of the Non-Voice, Non-Geostationary Mobile Satellite Applications of	)	
CTA Commercial Systems, Inc.	)	File No. 23-SAT-P/LA-95
E-Sat, Inc.	)	File No. 24-SAT-P/LA-95
Final Analysis Communication Services, Inc.	)	File No. 25-SAT-P/LA-95
GE American Communications, Inc.	)	File No. 26-SAT-P/LA-95
Leo One USA Corporation	)	File No. 27-SAT-AMEND-95
Orbital Communications Corporation	)	File No. 28-SAT-MP/ML-95
Volunteers In Technical Assistance	)	File No. 29-SAT-AMEND-95

ORDER

Adopted: December 21, 1994 Released: December 22, 1994

By the Chief, Satellite and Radiocommunication Division:

1. On December 8, 1994, Orbital Communications Corporation (ORBCOMM) asked the Commission to extend by 30 days the comment date on the above-referenced non-voice, non-geostationary (NVNG) mobile satellite service applications. We grant ORBCOMM's request.

2. On November 16, 1994, seven parties filed second round NVNG applications in response to a cut-off date established by the Commission. By Public Notice, DA 94-1323, Report No. DS-1484, released November 25, 1994, the Commission asked for comment on these applications by January 25, 1995. ORBCOMM seeks to extend this deadline until February 24, 1995. In support of its request, the company states that a thorough examination

of these applications for legal, technical and financial compliance is a considerable, and time-consuming, effort. ORBCOMM further notes that the NVNG proponents are actively engaged in preparation for the upcoming World Radiocommunication Conference. Finally, ORBCOMM says that, since the Commission needs to complete processing the first round of NVNG applications before it can begin to process the second round, the brief extension requested will not delay Commission action on the second round applications.

3. None of the second round applicants has filed an opposition to the extension request,[1] and GE American Communications, Inc. has filed comments in support of the extension. In light of the general support for this request, the number of applications that must be analyzed, and the lack of prejudice to second round applicants, we believe that a 30 day extension of the comment period is warranted.

4. Accordingly, pursuant to Section 0.261 of the Commission's rules on delegations of authority, the pleading cycle on the referenced NVNG applications is extended as follows: comments may be filed on or before February 24, 1995; replies and oppositions until March 27, 1995; and responses until April 14, 1995.

Thomas S. Tycz
Chief, Satellite and
Radiocommunication Division
International Bureau

[1] ORBCOMM represents that CTA Commercial Systems, Inc. objects to the requested extension of time.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

DA 94 - 1572

In the Matter of	)	
	)	Transmittal No. 7731
AT&T Communications	)	
Tariff F.C.C. No. 1	)	

ORDER

Adopted: December 22, 1994 ; Released: December 22, 1994

By the Acting Chief, Tariff Division, Common Carrier Bureau:

1. On November 10, 1994, AT&T Corp. (AT&T) filed Transmittal No. 7731 to introduce a Postalized Calling Plan which offers distance insensitive peak and off-peak rates for residential customers making direct-dialed domestic and international calls. Customers who wish to participate in the plan must presubscribe their telephones to the 10686 Carrier Identification Code (CIC). As amended, Transmittal 7731 is scheduled to take effect on December 25, 1994.[1]

2. On November 23, 1994, MCI Telecommunications Corporation (MCI) filed a petition to reject, or suspend and investigate, Transmittal 7365. In its petition, MCI claims that AT&T's offering is unlawfully vague.[2] It argues that the transmittal raises an issue with respect to the identity of the underlying carrier because the 10686 CIC is currently assigned to a Canadian telecommunications company, Unitel Communications, Inc. (Unitel). It contends that inbound or outbound international calls to or from premises presubscribed to the 10686 code might be routed through Canada to their final destination. This, MCI contends, would adversely affect the Commission's ability to administer the

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[1] On December 2, 1994, AT&T filed Transmittal No. 7849 to clarify the material it filed in Transmittal 7731. AT&T filed additional clarifications in Transmittal No. 7946, which was filed on December 21, 1994.

[2] MCI Petition at 1-2.

international settlements process because accounting rates between the United States and Canada would apply, rather than accounting rates that would apply between the United States and the foreign correspondent in the jurisdiction where the call originates or terminates.[3]

3. AT&T filed a reply on December 5, 1994. AT&T argues that its tariff is not vague or ambiguous.[4] It asserts that its proposed Postalized Calling Plan encompasses only calls originating within the United States, and claims that Unitel has granted AT&T the exclusive right to use the 10686 CIC for all calls that originate within the United States.[5] It contends that it will route international calls directly to the country where the terminating number is located.[6]

4. The Common Carrier Bureau has reviewed AT&T Communications Transmittal No. 7731 and the related pleadings. We conclude that the filing does not warrant rejection because it does not, on its face, conflict with a statute or with an agency regulation or order. We further conclude that the petition does not demonstrate that an investigation is warranted at this time.

5. Accordingly, IT IS ORDERED that the petition to reject or suspend and investigate AT&T Communications Tariff F.C.C. No. 1, Transmittal No. 7731, filed by MCI Telecommunications Corp., IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Geraldine A. Matise
Acting Chief, Tariff Division
Common Carrier Bureau

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[3] Id. at 3-4.

[4] AT&T Reply at 2-3.

[5] Id. at 2 n.2.

[6] Id. at 4.

PUBLIC NOTICE

FEDERAL COMMUNICATIONS COMMISSION
1919 M STREET N.W.
WASHINGTON, D.C. 20554

News media information 202/632-5050. Recorded listing of releases and texts 202/632-0002.

DA 94-1573

REVISED COMPENSATION OBLIGATIONS FOR INTEREXCHANGE CARRIERS REQUIRED TO PAY COMPENSATION TO COMPETITIVE PAYPHONE PROVIDERS

CC Docket No. 91-35

Released: December 22, 1994

On May 8, 1992, the Commission released its Second Report and Order, CC Docket No. 91-35, 7 FCC Rcd 3251 (1992) ("Order"), which directed certain interexchange carriers ("IXCs") to pay monthly compensation to competitive payphone providers at a collective rate of $6.00 per competitive payphone for originating interstate access code calls. As defined in the Order, "competitive payphones" are payphones that are not owned by a local exchange carrier or AT&T. The IXCs required to pay compensation are those that earn at least $100 million in annual toll revenues and provide operator services. The initial compensation obligation of each IXC, listed in Appendix B of the Order, was based on the 1990 toll revenue data, as set forth in the Commission's report entitled "Long Distance Market Shares: First Quarter, 1991," Industry Analysis Division, FCC, June 28, 1991. In the Order, the Commission noted that it would revise these compensation obligations in accordance with revised toll revenue data. Order at 3259 n.84.

On September 16, 1993, the Commission released its Memorandum Opinion and Order on Reconsideration, 8 FCC Rcd 7151, 7154 (1993), which established a procedure by which IXCs may have their names removed from the list of carriers required to pay compensation by filing with the Chief, Common Carrier Bureau, a notarized affidavit stating that the IXC does not receive end-user initiated access code calls from payphones on which it is not the presubscribed carrier. The Commission required that affidavits be refiled each year within 30 days after public notice of the "Long Distance Market Shares Report." None of the interexchange carriers required by the Order to pay compensation filed such an affidavit this year.

As is its standard practice, the Industry Analysis Division once again issued an updated "Long Distance Market Shares" report on July 11, 1994, which contains 1993 toll revenue data. Based on this updated data, the compensation obligations of the IXCs are adjusted as follows:

IXC	% of Toll Revenues	Amount Per Phone Per Month
AT&T Corp.	63.00763	$3.7804578
MCI Telecomm. Corp.	19.30381	1.1582286
Sprint Commun. Co.	10.82544	.6495264
LDDS Commun., Inc.	2.01907	.1211442
Wiltel, Inc.	1.17088	.0702528
Cable & Wireless Comm., Inc.	.98220	.0589320
Allnet	.76883	.0461298
Alascom, Inc.	.56428	.0338568
LCI Intl. Telecom Corp.	.55899	.0335394
RCI Long Distance, Inc.	.37560	.0225360
Oncor Commun., Inc.	.24687	.0148122
U.S. Long Distance, Inc.[1]	.17633	.0105798

These compensation obligations will become effective on January 1, 1995 and will supersede those set forth in the Revised Compensation Obligations Notice, DA 93-1548, 9 FCC Rcd 159 (1993).

FEDERAL COMMUNICATIONS COMMISSION

[1] General Communication, Inc. ("GCI") reported total operating revenues of $102,213,000 in its Form P submission for 1993, and GCI was subsequently listed in "Long Distance Market Shares" for the second quarter of 1994. However, in its Form P submission, GCI noted that its reported operating revenues included $10,375,000 derived from non-communications operations. Accordingly, GCI's annual toll revenues were less than the $100 million threshold, and, therefore, GCI is not included among those IXCs required to pay compensation to competitive payphone providers.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

DA 94-1595

In the Matter of:	)	
	)	
Petition for Relief of	)	
TV-24 SARASOTA, INC.	)	CSR-4178-L
	)	
Vs.	)	
	)	
COMCAST CABLEVISION OF WEST	)	
FLORIDA, INC.	)	
	)	
For Leased Access Channels	)	

MEMORANDUM OPINION AND ORDER

Adopted: December 23, 1994 **Released**: December 27, 1994

By the Chief, Cable Services Bureau

I. Introduction

1. On December 13, 1993, TV-24 Sarasota, Inc. ("TV-24") filed a Petition for Relief pursuant to Section 76.975 of the Federal Communications Commission's rules against Storer Cable Communications of West Florida, Inc. ("Comcast")[1] alleging violations of the Commission's commercial leased access rules. On January 12, 1994, Comcast filed a Reply to TV-24's petition in which it asserted that it has fully complied with its obligations under our commercial leased access rules.[2] In response to a Commission request, Comcast filed

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[1] Since the filing of its Reply the name of Storer Cable of West Florida, Inc. has been changed to Comcast Cablevision of West Florida, Inc. (called herein "Comcast").

[2] The reply presents an argument that any requirement to make channel capacity available for third party use is a violation of Comcast's First and Fifth Amendment rights. These general arguments have both been considered by Congress and are the subject of separate litigation addressing the leased access provisions. Thus, we will not address them

supplemental information on September 9, 1994.[3] TV-24 filed a response to Comcast's supplemental filing on September 20, 1994.

II. Background

2. In 1984, Congress amended the Communications Act of 1934 to add, among other things, a requirement that cable operators with 36 or more activated channels set aside part of their channel capacity for use by programmers that are not affiliated with them.[4] This requirement is called the commercial leased access or "leased access" requirement. The Cable Television Consumer Protection and Competition Act of 1992 (the "1992 Cable Act") revisited the leased access requirement and directed the Commission to establish, among other things, rules for determining maximum reasonable rates for leased access.[5] Pursuant to that Congressional directive, the Commission established rules applicable to leased access channel rates in its May 3, 1993 order for *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992; Rate Regulation*, MM Docket 92-266, (the *Rate Order*), 8 FCC Rcd 5631 (1993), at ¶¶ 531-538. *See also*, 47 C.F.R. § 76.970.

3. In the *Rate Order*, the Commission developed procedures for cable operators to follow in determining the maximum reasonable rate that a cable operator may charge any nonaffiliated programmer for leased access.[6] Under the Commission's rules, maximum reasonable rates are to be developed by cable operators for three categories of programs.[7] The three program categories are: (1) pay-per-event or pay-per-channel programs; (2) programming where more than fifty percent of the capacity is used to sell products to subscribers; and (3) all other programs. The highest implicit net fee that a cable operator

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further here.

[3] Comcast filed supplemental information in response to a letter dated August 8, 1994, from the Commission's staff requesting certain information beyond that provided with the pleadings in order to assist in making a determination of compliance with our leased access rules.

[4] Communications Act of 1934, as amended, § 612(b)(1), 47 U.S.C. § 532(b)(1)(1992). The amount of channel capacity an operator must set aside is based on a system's activated channel capacity.

[5] Communications Act of 1934, § 612(c)(4)(A) & (B), 47 U.S.C. § 532(c)(4)(A) & (B) (1992).

[6] 47 C.F.R § 76.970(b)(c) and (d).

[7] 47 C.F.R. § 76.970(f).

charges any nonaffiliated non-leased access programmer within each category is to be calculated, using procedures described in our rules, on a monthly basis. The highest implicit net fee thus determined for each of the three program categories becomes the maximum monthly rate that the operator may charge a programmer for leased access for that program category.[8]

4. The Commission determined that certain issues associated with obtaining leased access should be left for negotiations between the parties. For example, in establishing the maximum reasonable rates for leased access, the Commission noted that lower rates could be negotiated.[9] With respect to channel placement and tier access, the Commission also stated that this should be left in the first instance to negotiation between the parties.[10] The Commission further noted its belief that cable operators should accommodate all leases, *i.e.*, leasing an hour on a regular leased channel, leasing a whole channel, or leasing for use as a subscription service.[11] The Commission's rules provide some guidance for establishing rates for these shorter lease periods, stating that maximum rates can be calculated by prorating the monthly maximum rate.[12]

5. Pursuant to the 1992 Cable Act, the Commission in the *Rate Order* developed an administrative dispute resolution process for the purpose of expediting resolution of disputes concerning leased access requirements. Under this streamlined procedure, any person aggrieved by the failure or refusal of a cable operator to make leased access capacity available or to charge rates for such capacity as mandated by the 1992 Cable Act and Commission's rules may file a petition for relief with the Commission.[13]

III. The Pleadings

6. In its Petition for Relief against Comcast, TV-24, operator of a low power television station in the Sarasota/Manatee, Florida area, alleges that Comcast is in violation of the 1992 Cable Act's Section 612(b)(1) and of Section 76.970 of the Commission's Rules. TV-24's petition raises three basic claims. First, TV-24 claims that Comcast refuses to make that time available on another leased access channel, because the time slot it requests for its

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[8] 47 C.F.R. § 76.970(d).

[9] *Rate Order*, ¶ 519.

[10] *Rate Order*, ¶ 498.

[11] *Rate Order*, ¶ 498, n. 1277.

[12] 47 C.F.R. § 76.970(d).

[13] 47 C.F.R. § 76.975(b).

programming (7 p.m. to 9 p.m. on Tuesdays and Thursdays) is already taken on Comcast's only designated leased access channel. TV-24 contends Comcast is legally obligated to make available ten percent of its 40 activated channels for commercial leased access under Section 612(b)(1)of the 1992 Cable Act, and that Comcast's refusal to make available the required number of leased access channels violates the 1992 Cable Act.[14]

7. Second, TV-24 claims that the rate for leased access that Comcast has quoted is "well outside" the highest implicit net fee permitted to be charged under Section 76.970 of the Commission's rules. TV-24 undertook to calculate the highest implicit net fee that Comcast could charge, and determined the average hourly rate for leased access to be $63.88. Comcast's hourly charge as quoted to TV-24 for leased access is $120.00.[15]

8. Third, TV-24's petition raises the issue of how the monthly maximum permitted rate under our leased access rules can be applied to periods for leased access shorter than a month. Specifically, the issue is whether operators are required to pro rate the maximum monthly rate for shorter periods of leased access use or whether operators may charge different rates for different times of the day.

9. In its Reply to TV-24's first claim, Comcast explains that almost 90 percent of the full-time channel capacity on the existing leased access channel remains available for lease (almost 85 percent of the capacity during the hours of 6:00 a.m. to 12:00 p.m.).[16] Also, Comcast asserts that its Sarasota system is saturated. Thus, Comcast argues, "[a] requirement to open up successive channels would result in the elimination of program services while other leased access channel capacity remained fallow."[17] Comcast contends that its subscribers will be directly and adversely affected by interruptions to regular programming schedules and that program diversity will "take second place to the part-time leased access programming which could otherwise be easily accommodated within the statutory framework . . . without disrupting the viewing habits and preferences of system subscribers."[18]

10. As to TV-24's second claim, Comcast shows its calculation of the highest implicit net fee, from which it determined $81.00 per hour as the prorated leased access rate.

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[14] TV-24 Petition for Relief, pp. 1-2.

[15] TV-24 Petition for Relief, pp. 1-2.

[16] Comcast also raises, in its Reply, an argument that its First and Fifth Amendment rights are violated by any requirement to make channel capacity available for third party use. The Commission is not the proper forum to hear and determine such arguments.

[17] Comcast Reply, pp. 10 - 11.

[18] Comcast Reply, p. 11.

However, Comcast states further that the quoted $120.00 hourly rate "is a reasonable hourly leased access charge in prime-time."[19]

11. With respect to the third issue, Comcast argues that "[t]he application of the Commission's highest implicit charge formula on a strictly pro rata basis in this case, without regard to the daypart [or] the amount of time requested, would be inconsistent with marketplace realities."[20] In support of its $120/hour rate, Comcast submits that "[t]he historical existence of a leased access market in Sarasota at rates in excess of $120 per hour and the delivery of programming to 90,000 subscribers in an affluent, expanding market during prime-time is evidence that the payment of $120 per hour which Comcast quoted [to TV-24] is not unreasonable."[21]

IV. Discussion

12. The three issues presented in this case are significant issues now before the Commission on reconsideration.[22] In this order, we resolve the issues presented in accordance with the current rules applicable to leased access channels.

A. Opening of Additional Channels

13. The first issue presented is whether Comcast should be required to displace existing programming in order to make room for a specific request for two hour leased access time slots in circumstances where sufficient channel capacity exists on a channel being used for leased access to accommodate that request. The broader question of the conditions and circumstances under which cable operators may be required to remove or relocate existing services among channels in order to make the statutorily required channel capacity available for leased access has been raised in petitions for reconsideration of our leased access rules.[23] We do not address that broader question in this order. Instead, this order addresses only the specific issues raised in this case.

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[19] Comcast Reply, p. 5, n. 5.

[20] Comcast Reply, pp. 9-10.

[21] Comcast Reply, p. 9.

[22] *See* Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, MM Docket 92-266 (petitions for reconsideration pending).

[23] *Id.*

14. Comcast currently operates a 42 channel system[24] and is required by statute to set aside 10 percent of such channels which are not otherwise required for use by federal law or regulations for leased access.[25] However, according to Comcast, only one channel, channel 4, is currently set aside and being used for leased access.[26] The other 41 channels are currently occupied by existing programming. Comcast asserts that it should not be required to displace any of that other programming in order to open another leased access channel to make room for the two time slots requested by TV-24, so long as other time slots are available on the existing leased access channel.

15. There are some discrepancies between the information provided by Comcast to the Commission and that provided to TV-24 regarding available time slots on channel 4. For example, Comcast states that time slots are available on Tuesdays and Thursdays only from 8:30 a.m. to 9:00 p.m.[27] In Comcast's supplemental filing with the Commission of September 9, 1994, Exhibit A shows programming exists only from 7:00 p.m. to 11:00 p.m. on Monday through Thursday, with only two half hour programs at earlier times on these days.[28] Other discrepancies exist as well. Based on our review of the record, it appears that evening time slots are available on channel 4 after 6:00 p.m. on Friday and Saturday, and from 7:30 p.m. to 8:30 p.m. on Sunday.

16. A review of the facts in this case indicates that Comcast has evening time slots available on Friday, Saturday, and Sunday. TV-24's specific request is for time slots on Tuesday and Thursday. In order for Comcast to accommodate these requested time slots, existing programming on a channel other than channel 4 (the designated leased access channel) would have to be removed to make room for TV-24's programming consisting of a total of only fours hours a week. It is also possible that the remaining capacity of the newly opened leased access channel may remain blank for an indefinite period until additional programming develops. On the other hand, TV-24 could use the evening hours available on Friday, Saturday, and Sunday in lieu of the requested Tuesday and Thursday slots. Under

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[24] *See*, Comcast Response, p. 1.

[25] 47 U.S.C.§ 532 (b)(1)(A).

[26] The leased access statutory provisions require Comcast to set aside four of its 42 channels for leased access. Comcast may use any unused set aside capacity "until the use of such channel is obtained, pursuant to a written agreement, by a person unaffiliated with [Comcast]." 47 U.S.C. § 532 (b)(4).

[27] *See* Comcast letter to TV-24, dated August 4, 1994.

[28] *See* Exhibit A to the letter dated September 9, 1994 from Counsel for Comcast to the Acting Secretary of the Commission, which shows programmer BLAB TV occupying the 7:00 p.m. to 11:00 p.m. time slot on Monday through Thursday, and Gene Zany slotted for half hours at 6:30 p.m. Monday and 4:30 p.m. Wednesday.

this arrangement, TV-24 would be provided with evening time slots to accommodate the amount of programming it proposes to offer. Although the available time slots are not on the evenings requested, TV-24 has presented nothing that shows that its proposed programming has hour or day-critical aspects, such as live performances or sporting events that are scheduled for specific times.

17. The 1992 Cable Act requires that "[a]n operator of any cable system with 36 or more (but not more that 54) activated channels shall designate 10 percent of such channels which are not otherwise required for use (or the use of which is not prohibited) by Federal law or regulation" for commercial use by persons unaffiliated with the operator.[29] We believe that, consistent with this provision, cable operators who have not fulfilled the requirements for leased access set aside should be required to accommodate requests for leased access time.

18. Under the circumstances presented here, however, we believe that TV-24's request for evening time slots, two hours twice a week, is reasonably accommodated with evening hours comparable, although not on the precise days requested, to the time requested. The potential harm to Comcast and its viewers from a requirement that Comcast open an additional leased access channel in order to accommodate TV-24's four hours of programming would be substantially greater than any harm TV-24 has shown that it may experience by shifting its proposed programming to the currently available time slots.

19. Further, we believe that a possible disruption of existing programming in order to accommodate only a few hours of leased access demand, where adequate and comparable capacity is available on an existing access channel, will not advance the goal of assuring "that the widest possible diversity of information sources are made available to the public from cable systems in a manner consistent with the growth and development of cable systems."[30] This is particularly true in the instant circumstance where the requested time slots would occupy only four hours per week, but the programming that would otherwise be dislocated is full channel programming.

B. Maximum Implicit Net Fee

20. An initial rate issue is presented with respect to the proper calculation of the maximum implicit net fee for unaffiliated leased access programmers. TV-24's petition states that "the quoted rate [of $120 per hour is] well outside the guidelines established under section 76.970 of the Commissions Rules as amended April 1, 1993."[31]

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[29] 47 U.S.C. § 532 (b)(1)(A).

[30] 47 U.S.C. §532 (a).

[31] TV-24 Petition for Relief, p.1.

21. In footnote 5 of its Reply, Comcast sets forth its calculation of the implicit fee. In its calculation, Comcast takes a blended average monthly rate charged per basic subscriber ($8.32) and divides by the number of channels on the basic tier (13). This amount is then multiplied by the number of subscribers (90,000) for a per channel per month rate. Comcast then, divides the monthly rate by the number of hours in a month to obtain an hourly monthly rate.[32] TV-24 questions this calculation based on "information, directly from Comcast marketing representatives that the subscriber base to the Sarasota system [was] 74,000 on December 9, 1993."[33]

22. Our rules require that the implicit fee to be charged unaffiliated leased access programmers be calculated for each category "by determining the monthly price per subscriber that the operator pays to carry the programming of unaffiliated providers and deducting the monthly price subscribers pay to view the programming of the nonaffiliated provider. The difference is multiplied by the percentage of subscribers able to receive the nonaffiliated provider's programming."[34] The rules further require that "the highest net fee shall be based on contracts in effect in the previous calendar year."[35]

23. The Commission's staff requested that Comcast provide the highest implicit net fee for leased access rates and the calculations for determining this rate.[36] In response, Comcast referred to information and calculations contained in footnotes of its Reply.[37] The information and calculations provided there by Comcast do not comply with the requirements of Section 76.970(c) of the rules, in that no information regarding "the monthly price that the operator pays to carry the programming of nonaffiliated providers" was used in those calculations. For that reason, we cannot on this record determine Comcast's maximum implicit net fee, as a step toward determining whether its quoted maximum monthly rates are reasonable in accordance with our rules. In order to make this determination, we are requiring that Comcast provide supporting contracts for programming for the calendar year prior to December 1993 and its total subscribership for the Sarasota system as of December 1993. Comcast must provide this information and any other justifications for determining the commercial leased access rate within 20 days from the release date of this order.

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[32] Comcast Reply, p. 5, n. 5.

[33] TV-24 Response, p. 2.

[34] 47 C.F.R. § 76.970(c).

[35] 47 C.F.R. § 76.970(d).

[36] *See* Commission's staff letter of August 8, 1994.

[37] *See* Comcast letter, dated September 9, 1994.

C. Maximum Part-Time Rates

24. The third issue presented concerns the rates that Comcast may charge for hourly, or part-time use, and whether prime-time rates are appropriate rates to charge leased access programmers, such as TV-24. This issue is also before the Commission in the broader context of reconsideration of the leased access rules.[38] In this order we decide only the question presented in this case consistent with our current rules and do not undertake to resolve the issues presented for reconsideration in the rulemaking proceeding.

25. TV-24 calculates a leased access hourly rate of $64.88 and argues that Comcast's hourly rate should not exceed $64.88 per hour.[39] Comcast argues in response that application of the highest implicit charge formula on a strictly pro rata basis does not reflect marketplace realities. In support of this argument, Comcast asserts that at the foundation of the media industries lies the principle that all day parts are not of equal attractiveness to advertisers and other media users, and that applying the highest implicit fee formula, from which the maximum monthly rate is derived, on a strictly pro rata basis would be inconsistent with marketplace realities. Comcast argues further that assigning higher values to "prime-time" hours is not unfair to access users, because it reflects these marketplace realities. It argues that without such pricing differentials those parties that lease in less desirable day parts would be effectively providing a subsidy to those users of the more valuable "prime-time" day parts.[40]

26. The statutory provisions relating to leased access do not specifically address the question of rates for part-time use. Prorating the maximum monthly rate is one method by which rates for shorter periods can be derived. This method is stated in our rules as a method which can be used for establishing maximum rates for shorter periods.[41] However, the only rate that cable operators are not permitted to exceed under our rules is the maximum reasonable rate as calculated on a monthly basis from the highest implicit net fee.[42] We do not construe these rules as requiring an operator to adhere to a rigid formula for determining its hourly leased access rate by prorating its maximum rate for a full-time channel into equal hourly amounts. A rational time of day rate structure that is appropriately related to time of day pricing in the media industry within the overall "highest net implicit fee" formula and that does not frustrate leased access channel use would not conflict with the rules.

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[38] *See* n. 22 above.

[39] *See* TV-24 Petition, p. 2; TV-24 re-calculates this maximum implicit rate to be $65.65 per hour, TV-24 Response, p. 2.

[40] Comcast Reply, pp. 9-10.

[41] *See*, Section 76.970(d).

[42] *See*, Section 76.970(c).

27. We agree with Comcast that the media industry places different values on the different hours of the day in recognition of the different values that different hours of the day have in the market place. Accordingly, we conclude that cable operators should be allowed to charge different time-of-day rates so long as the differences have a reasonable basis. This approach will better recognize the different values that different time slots have in the marketplace in which both cable operators and cable programmers, as well as other media users such as advertisers, operate. This approach will also further the statutory goal of promoting diverse programming, because programmers that could not afford rates based on uniform pro rata pricing may be better able to afford the resulting lower "non prime-time" rates. Additionally, allowing "prime-time" pricing should help promote fuller utilization of designated leased access channels by making "non prime-time" slots more attractive.

28. Permitting cable operators to charge reasonable "prime-time" hourly rates allows them to obtain the highest market value of system channel capacity, as our rules anticipate under the methodology for calculating the maximum monthly rate for a full channel.[43] However, in order to assure that the maximum monthly rate is not exceeded, we will require that Comcast establish a schedule of rates, or rate card, for different times of day pursuant to which, if all times were used, the sum of the part time charges for any single leased access channel would not exceed its maximum monthly rate for a leased access channel calculated in accordance with Section 76.970 or our rules.[44] Such rate structure shall be reasonably reflective of empirical time of day values and should not serve merely as a mechanism to retard use. We will also require Comcast to maintain on file adequate records, consistent with Section 76.970(e) of our rules, that show the total monthly revenues derived from part time users of each leased access channel, together with the maximum monthly charge for a full leased access channel and the documentation and calculations used for deriving the maximum monthly charge in accordance with Section 76.970 of the rules. We reserve the

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[43] In establishing regulations applicable to the development of leased access rates, the Commission adopted a methodology for calculating rates for leased access channels which takes into account the value placed on those channels by the cable operator. This methodology uses computed rates based on subscriber rates for basic, cable programming and premium services tiers and on rates paid by the cable operator for programming on those tiers of services. This methodology establishes the highest maximum rates for each of the three separate categories of cable programming defined in the rules. The Commission concluded that rates determined in this manner would be fair because they ". . . are derived from the highest market value of channel capacity of the system, " (*i.e.*, capacity utilized by unaffiliated programmers carried on the cable system). The Commission observed that despite a possible monopsony relationship between the cable operator and programmer paying the maximum contract rate, such rates would be reflective of maximum value for system channel capacity. (*See Rate Order, ¶519).*

[44] *See* 47 C.F.R. § 76.970(d).

right to review Comcast's part time rates to assure that they both encourage use and provide reasonable and adequate compensation within the "implicit fee" structure.

29. As noted earlier, cable operators and cable programmers remain free to negotiate hourly leased access rates that generate charges lower than that derived from application of our rules.[45] In this context, we have confidence that cable programmers, such TV-24, recognize the different values that are placed by the entire media industry on different day parts in the media markets in which they operate. These different values provide incentives for cable programmers to negotiate for favorable time slots appropriate to the value of the programming services they offer. Accordingly, until we gain more experience under our current rules for leased access rates, we see no need to impose an overly rigid formula for part time rates such as a straight prorating of the maximum monthly full channel rate that TV-24 seeks.

V. Ordering Clauses

30. Accordingly, IT IS ORDERED that the Comcast Cablevision of West Florida, Inc. (herein "Comcast") shall, within twenty days of the effective date of this order, file with the Commission all contracts for programming in effect for the calendar year prior to December 1993, the number of subscribers for the Sarasota, Florida system as of December 31, 1993, and any other relevant documentation, that it used to justify the calculation of the maximum monthly implicit net fee for leased access as provided in our rules.

31. IT IS FURTHER ORDERED that Comcast shall, within twenty days of the effective date of this order, establish a reasonable schedule of rates, or rate card for different times of day pursuant to which, if all times were used, the sum of the part time charges for any single leased access channel would not exceed its maximum monthly rate for a leased access channel calculated in accordance with Section 76.970 or our rules.

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[45] *Rate Order*, at ¶ 519.

32. IT IS FURTHER ORDERED that Comcast shall maintain on file adequate records, consistent with Section 76.970(e) of our rules, which show the total monthly revenues derived from part time users of each leased access channel, together with the maximum monthly charge for a full leased access channel and the documentation and calculations used for deriving the maximum monthly charge in accordance with Section 76.970 of the rules.

33. This action is taken pursuant to authority delegated by Section 0.310 of the Commission's rules, 47 C.F.R. § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

FCC 94-322

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Review of the Commission's	)	MM Docket No. 91-221
Regulations Governing Television	)	
Broadcasting	)	
	)	
Television Satellite Stations	)	MM Docket No. 87-8
Review of Policy and Rules	)	

FURTHER NOTICE OF PROPOSED RULE MAKING

Adopted: December 15, 1994 Released: January 17, 1995

Comment Date: April 17, 1995
Reply Comment Date: May 17, 1995

By the Commission: Commissioners Quello and Ness issuing separate statements.

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I. INTRODUCTION

1. With this Further Notice of Proposed Rule Making ("Further Notice" or "FNPRM"), the Commission proposes a new analytical framework within which to evaluate our ownership rules applied to television stations. This new framework provides a more structured approach to a comprehensive economic and diversity analysis of the rules. While we have found the comments received in response to the Notice of Inquiry ("Inquiry")[1] and Notice of Proposed Rule Making ("Notice" or "NPRM")[2] useful, we believe that the issuance of this Further Notice is necessary to permit us to compile a record based upon this new framework which will enable us to make a fully informed decision in this important area.[3] Additionally, we solicit further comments here in MM Docket No. 87-8, Television Satellite Stations, on issues relevant to the two proceedings.

II. BACKGROUND

A. The Rules

2. Regulation of broadcast station ownership has been a constant feature of the Commission's Rules for decades. In the early 1940's the Commission, for the first time, established limits on the number of licenses that could be held under common control nationally. These initial multiple ownership rules prohibited the issuance of a license to anyone already possessing a license in the same broadcast service unless the applicant could demonstrate that the issuance of the license (1) would have a pro-competitive impact, and (2)

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[1] 6 FCC Rcd 4961 (1991).

[2] 7 FCC Rcd 4111 (1992).

[3] Although the network rules were also a subject of the Inquiry and the Notice, further comment is currently being sought only with respect to ownership issues. We are taking a step-by-step approach, looking first at the ownership structure for television.

would not result in the concentration of control of broadcasting facilities in a manner inconsistent with the public interest. Absolute limits were placed on the common ownership of FM stations (6 stations)[4] and TV (3 stations, raised to 5 in 1944),[5] and, in 1946, the Commission placed a de facto limit of 7 on the ownership of AM stations by denying CBS an application for an eighth such station.[6] In 1953, the Commission adopted national multiple ownership rules that allowed for the common ownership of 7 AM, 7 FM and 5 TV stations.[7] The stated rationale for limiting ownership on a national basis was twofold -- to encourage diversity of ownership in order to foster the expression of varied viewpoints and programming, and to safeguard against undue concentration of economic power.[8]

3. The national ownership rules remained substantially unchanged between 1954 and 1984. At that time, citing an "explosive growth and change" in the mass media market, the Commission initially decided to phase out national ownership limits but, on reconsideration, established a twelve station limit in each service.[9] Additionally, it established an "audience reach cap" that limited the aggregate ownership interests in television stations to those which reached a maximum of 25 percent of the national audience.[10] Also, the Commission established a minority "bubble" which increased to 14 the permissible ownership limitation in any service for minorities; persons acquiring cognizable interests in minority owned and controlled broadcast stations were also entitled to these higher limitations. Similarly, the aggregate reach of TV stations was raised to 30% of the national audience, provided that at least 5 percent of that reach is contributed by minority controlled stations. Although the Commission has since amended the national and local ownership limitations for radio

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[4] 5 FR 2384 (1940).

[5] 6 FR 2284 (1941); 9 FR 5442 (1944).

[6] Sherwood B. Brunton, 11 FCC 407 (1946).

[7] Amendment of Multiple Ownership Rules, 9 RR 1563 (1953). The limit on television stations was raised to 7, with no more than 5 being VHF stations, the next year. Amendment of Multiple Ownership Rules, 43 FCC 2797 (1954).

[8] Amendment of Multiple Ownership Rules, (Gen. Docket 83-1009) 100 FCC 2d 17, 18 (1984), recon. granted in part 100 FCC 2d 74 (1985).

[9] Id.

[10] UHF stations were attributed only 50 percent of their theoretical Area of Dominant Influence ("ADI") reach because of the physical limitations of their signals. 100 FCC 2d at 93-94.

stations,[11] the limits have remained the same for television since 1984.

4. With respect to local ownership, the Commission, early in its existence, addressed "duopoly," the common ownership of more than one station in the same service in a particular community. In 1938, the Commission adopted a strong presumption against granting license applications that would result in duopolies.[12] This was based in part on a "diversification of service" rationale, which suggests that the Commission believed its diversity concerns were better promoted by a greater number rather than a lesser number of separately owned outlets. Rules prohibiting FM duopolies were adopted in 1940 and a rule banning AM duopolies followed in 1943. As indicated in the NPRM in the instant proceeding, the current version of the television duopoly rule was adopted in 1964, when the Commission promulgated ownership restrictions based on fixed contour overlap standards.[13] The Commission relaxed the limitations on radio in 1992.[14]

5. The duopoly rule did not prevent a single party from owning or controlling more than one station in the same area if each station was in a different service. In 1970, the Commission adopted a one-to-a-market rule proscribing common ownership, operation, or control of more than one broadcast station in the same area, regardless of the type of broadcast service involved.[15] The Commission again cited fostering maximum competition in broadcasting and the promotion of diversification of programming sources and viewpoints as justification for the one-to-a-market rule. Later, in 1989, citing a dramatic growth in the number of local broadcast outlets, the resulting reduction in the risk that relaxing the one-to-a-market rule would significantly decrease competition, and evidence that joint ownership of two or more media outlets in the same market does not necessarily lead to a commonality of viewpoints,[16] the Commission added Note 7 to Section 73.3555 of the Commission's Rules.

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[11] Revision of Radio Rules and Policies, 7 FCC Rcd 2755 (1992), recon. granted in part, 7 FCC Rcd 6387 (1992), further recon., 9 FCC Rcd 7183 (1994).

[12] Genesee Radio Corp., 5 FCC 183 (1938).

[13] Report and Order in Docket 14711, 45 FCC 1476 (1964), on reconsideration, 3 RR 2d 1554 (1964). The prohibited overlap adopted for the AM and FM services was 1 mV/m, and Grade B overlap was barred for the television service..

[14] Revision of Radio Rules and Policies, supra at 2773-74.

[15] First Report and Order, Docket No. 18110, 22 FCC 2d 306 (1970). On reconsideration, the Commission abandoned the restrictions the rule would have placed on the formation and transfer of AM/FM combinations. Memorandum Opinion and Order, Docket No. 18110, 28 FCC 2d 662 (1971).

[16] Second Report and Order in MM Docket 87-7, 4 FCC Rcd 1741, 1744 (1989), on reconsideration 4 FCC Rcd 6489 (1989).

That Note stated that the Commission would look favorably upon requests for waiver of the one-to-a-market rule if the television-radio combination would occur in one of the top 25 television markets and 30 separately owned, operated, and controlled broadcast licensees would remain after the combination, or if the request involved a "failed" station.[17] It also indicated that the Commission would evaluate, on a case-by-case basis, waiver requests predicated on any of five other grounds set out in the Commission decision adopting Note 7. The rule has remained unchanged since that time.

B. The Proceeding

6. In 1991, the Commission's Office of Plans and Policy (OPP) issued a wide-ranging report on broadcast television and the evolving market for video programming.[18] That report observed that the market had undergone tremendous changes over the previous fifteen years. It found that the policies of the FCC and the federal government, chiefly in enacting the 1984 Cable Act, had generated new competition to "traditional" broadcast services resulting in increased choices for viewers. Further, the report suggested that these increased choices meant increased competition for broadcast television and were, indeed, affecting its ability to contribute to a diverse and competitive video programming marketplace.

7. As a result of the OPP report, we issued a Notice of Inquiry soliciting comment on whether our existing ownership rules and related policies should be revised to enable television licensees to be more responsive in meeting this competition. After reviewing the record developed in response to the Inquiry,[19] we issued a Notice of Proposed Rule Making in order "to consider changes to several of the structural rules that have governed the television industry for many years."[20] These rules included those limiting the ownership interests that a person or entity may have in television stations on both national and local levels. We also solicited comment on certain rules governing the relationship between a network and its affiliates.[21] We believed that these rules needed to be amended in order to strengthen the potential of over-the-air television to compete in the current video marketplace and enhance

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[17] Id.

[18] F. Setzer and J. Levy, Broadcast Television in a Multichannel Marketplace, FCC Office of Plans and Policy Working Paper No. 26, 6 FCC Rcd 3996 (1991) ("OPP report").

[19] 6 FCC Rcd 4961 (1991). Thirty-nine parties filed comments and 19 filed reply comments.

[20] NPRM, supra at 4111.

[21] See supra note 3.

its ability to bring increased choice to consumers.[22]

8. The commenting broadcasters, with one exception, favored elimination or relaxation of the current national ownership limits.[23] Public interest groups and one broadcaster (Fisher Broadcasting Inc.) favored their retention. Those commenting in favor of elimination or relaxation of the limits argued that the proliferation of television stations and alternative video delivery services has weakened the diversity rationale of the rules. Additionally, they asserted that increased group ownership will permit broadcasters to achieve economies of scale that would enhance their ability to compete with cable. Those favoring retention argued that increasing the national limits will undermine diversity and that any savings realized as a result of economies of scale will be used to reduce debt or purchase more expensive syndicated programming -- not to produce new, diverse local programming.

9. There was also substantial comment in favor of relaxation of the duopoly rule which prohibits common ownership of broadcast television stations whose Grade B signal contours overlap. Most commenters believed that prohibiting only Grade A signal contour overlap is warranted and that changing the rule accordingly would enhance broadcasters' viability by enabling them to realize economies of scale. A number of other rule changes were suggested ranging from elimination of the rule altogether to allowing VHF-UHF combinations. Public interest groups and a few broadcasters advocated retention of the rule. Chiefly, they believed that only strong stations will be able to take advantage of relaxation of the rule, and that weak stations that are not purchased by these stations will be priced out of the quality programming market and will have to either rely on "infomercials" or be forced to shut down. Either result, they contended, will harm diversity.

10. A majority of the comments submitted with regard to the television/radio "one-to-a-market" rule -- which generally prohibits the common ownership of television and radio stations serving the same area -- favored its relaxation or complete elimination. These commenters argued that its elimination or liberalization would allow marginal stations to remain on the air (by being owned in common with another local station in a different service) and that the number of independent broadcasters that would remain in most markets would be sufficient to prevent undue concentration. Those in favor of relaxation of the rule proffered a number of alternative ways in which the rule could be eased, such as by allowing common ownership of one AM, one FM and one TV station with overlapping signal contours or by allowing TV/radio combinations where anywhere from 12 to 30 independent broadcast "voices" would remain. The only clear opponent of elimination or relaxation of the rule --

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[22] We received 34 comments and 12 reply comments in response to the Notice. An additional 5 comments were filed late. We have, however, considered them, as well. See Appendix A for a complete list of commenters.

[23] For a more detailed summary of the comments filed in response to the NPRM, see Appendix B, attached.

Barnstable Broadcasting, Inc. -- argued that doing so would adversely affect radio-only operations.

11. The NPRM also discussed one other issue: the treatment of time brokerage agreements, also known as local marketing agreements ("LMAs"), for television stations. These agreements, which are discussed in more detail later in this document, allow one station to purchase blocks of time on another separately owned station which the broker then uses for his own programming and advertising sales. The Commission has adopted some guidelines for radio LMAs, but has not adopted any guidelines for TV LMAs. Few comments were submitted in response to our queries in the NPRM about TV LMAs. Some commenters argued that, unless the duopoly rule is relaxed or eliminated, adoption of the radio model for television LMAs would doom many such agreements because interests that would be attributed as a result of LMAs would give many participants in television LMAs an attributable and impermissible interest in a second local television broadcast station. Other commenters proposed adoption of ownership TV LMA attribution rules similar to those governing radio LMAs.

C. The Further Notice

12. We are issuing this Further Notice to consider the effects of several major developments since the 1992 NPRM that have altered the telecommunications landscape and accentuated the need to further explore the desirability of modifying the TV ownership rules. In particular, the Commission has re-regulated cable television pursuant to Congressional mandate, leading to rate reductions and raising the prospect of increased cable penetration. DBS and wireless cable (MMDS) are becoming increasingly important players in the video marketplace, and some telephone companies may soon begin to provide video dialtone service. These developments should increase the number of competitors to TV stations and thus may justify relaxing restrictions placed on television ownership. We wish to analyze the extent to which our TV ownership rules should explicitly take into account the existence of other competing media. Finally, in 1992, we adopted a regulatory scheme, recently reaffirmed and clarified,[24] governing LMA rules for radio and wish to consider whether similar rules should be adopted for TV.[25]

13. To this end, this Further Notice is intended to provide further analyses of the economic and diversity issues with respect to the various proposals to revise our national and local multiple ownership rules for television stations. This Further Notice provides a statement of frameworks for the economic and diversity analyses of these rules within which we solicit additional comment.

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[24] Revision of Radio Rules and Policies, supra.

[25] Id.

14. We therefore provide the following two sections. The first section, Competitive Analysis of Television Broadcasting, provides the framework for structuring the economic analyses of the rules under consideration. The second section, Diversity Analysis of Television Broadcasting, provides the framework for structuring the diversity analyses of the rules under consideration. The Commission encourages the public to comment on the issues raised by these sections, and to use them to frame comments on the subsequent analyses of the rules.

III. COMPETITIVE ANALYSIS OF TELEVISION BROADCASTING

15. An important part of the Commission's public interest mandate is to promote competition, because competition promotes consumer welfare and the efficient use of resources.[26] To examine the effect on competition of changing the rules under consideration, we must set out the framework within which we will consider the economic issues. In Section III A we briefly describe the economic framework within which we structure the economic analysis. In Section III B we set out the relevant product markets which our rules affect. In Sections III C, D, and E, we address fundamental issues in delineating and describing these relevant product markets. Finally, in Section III F, we summarize the key economic assumptions we apply in subsequent economic analyses of the rules under consideration.

A. Framework for Competitive Analysis

16. The purpose of competitive analysis is to describe the markets at issue in light of established economic theory and legal precedent to determine how the current market structure and regulatory scheme affect competition and consumer welfare. A policy of encouraging competition attempts to achieve this goal by protecting consumers and companies from the abuse of market power by a firm or a group of firms. As a result, the Commission's competitive analysis of the rules at issue in this proceeding focuses upon whether and to what extent market power exists and is being exercised, and what effect these rules have on the existence and exercise of this market power. This analysis requires two steps: (1) definition of the relevant product markets, and (2) examination of these markets' structure for evidence on the existence and exercise of market power.

17. The Supreme Court has stated that in defining a "product" for antitrust law purposes, "no more definite rule can be declared than that commodities *reasonably interchangeable by consumers for the same purposes*" constitute one product market.[27] Examining "cross-elasticities" of demand and supply is one way to define the "product," an

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[26] Id.

[27] United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 394 (1956) (emphasis added); see also Brown Shoe Co. v. United States, 370 U.S. 294, 324-25 (1962).

approach which is generally accepted among economists and commentators.[28] A variety of product or service attributes determine the degree of substitutability between different products. For example, a consumer might view a low quality car as a poor substitute for a high quality car and require a large price differential to consider the purchase of the low quality car. A standard method to define the product market a particular firm operates within is to ask the question: if this firm raised the price of its product, to what degree would consumers continue to purchase that product or turn to the products of other firms, and what are these other products and other firms?[29]

18. After the relevant products are determined, the geographic extent of the market is outlined. In general, the geographic market refers to the area where buyers of the particular product can practicably turn for alternative sources of supply, or the area in which sellers sell this product. It should be noted that the "geographic market" is not limited to the region where the relevant product is *currently* traded but where it can *practicably* be traded. It has been said that the geographic market is the "area of effective competition"[30] or the area in which products compete with substantial parity.[31] A useful technique in determining the geographic market a particular firm operates in is to examine the geographic region where buyers would buy and where sellers would sell in response to a "small but significant and nontransitory" price increase by that firm.[32] No single geographic market definition is likely

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[28] See William M. Landes & Richard A. Posner, Market Power in Antitrust Cases, 94 Harv. L. Rev. 937, 945-48 (1981). Cross-elasticities of demand refer to how the quantity demanded of a product responds to changes in price of another product (e.g., how will CocaCola sales respond to a change in the price of Pepsi). Cross-elasticities of supply refer to how the quantity supplied of a product responds to changes in the price of another product (e.g., how will CocaCola's production respond to a change in the price of Pepsi) .

[29] See U.S. Department of Justice and Federal Trade Commission, 1992 Horizontal Merger Guidelines § 1.11, 4 Trade Reg. Rep. (CCH) ¶ 13,104 (in applying antitrust law, DOJ and FTC define a product market by postulating demand-side responses to a "small but significant and nontransitory" increase in price by a "hypothetical monopolist").

[30] Standard Oil Co. v. United States, 337 U.S. 293, at 299 n.5 (1949); Policy & Rules Concerning Rates for Competitive Common Carrier Services & Facilities Authorizations Therefor, Fourth Report & Order, 95 FCC 2d 554, 563 (1983).

[31] Satellite Television & Associated Resources, Inc. v. Continental Cablevision, Inc., 714 F.2d 351, 356 (4th Cir. 1983), cert. denied, 465 U.S. 1027 (1984).

[32] DOJ/FTC Merger Guidelines at § 1.21.

to be decisive for all purposes of examining a particular industry.[33]

19. Once reasonably interchangeable substitutes are identified and the geographic extent of the market is delineated, the participants in the relevant product market can be identified. This identification allows market shares to be calculated to characterize the market's structure and its concentration. Such calculations are useful as one component of a competitive analysis of potential market power.[34]

20. As with many other human activities, a firm's possession and use of market power is a matter of degree. However, a firm abuses such power when it attempts to "control prices or exclude competition."[35] Therefore, conditions that allow a firm or a group of firms to set price profitably above (or reduce quality below) the competitive level and maintain such a price or quality over time without attracting competitive entry raise concerns about the potential for abuse. The potential for abuse is limited by the degree to which its consumers can turn to substitutes, the competition offered by its existing competitors, the potential competition offered by new entrants, and the degree to which its suppliers can sell their product to other firms.[36] If the relevant product markets are properly defined, the ability of consumers to turn to substitute products offered by other firms will already be reflected in their definition. Market share and concentration can only be reasonable proxies to estimate market power if the market is properly defined.[37]

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[33] See,e.g., Network Inquiry Special Staff, FCC, New Television Networks: Entry, Jurisdiction, Ownership and Regulation 334, at 337-38 (1980)(in analyzing television, while "markets for television equipment and programs may reasonably encompass the entire nation, the geographic market for home viewed television programming might be extremely local").

[34] See United States v. Grinnell, 384 U.S. 563, at 571 (1966), (high market share may ordinarily raise an inference of monopoly power). See also Ball Memorial Hospital, Inc. v. Mutual Hospital Insurance, Inc., 784 F.2d 1325, 1335 (7th Cir. 1986) ("In many cases a firm's share of current sales does indicate [market] power," and market power can develop "[w]hen a firm (or group of firms) controls a significant percentage of the productive assets in the market.")

[35] United States v. E.I. duPont de Nemours & Co., 351 U.S. 377 (1956).

[36] D.W. Carlton and J.M. Perloff, Modern Industrial Organization, (2nd edition, HaperCollins, 1994) at Chapter 9.

[37] One summary measure of market concentration used in standard antitrust analysis is the Herfindahl-Hirshman Index, or HHI. HHI is the sum of the squares of the market share of each supplier in a market. The DOJ and FTC, based upon extensive study of different industries, generally regard a market with an HHI below 1000 as "unconcentrated," a market between 1000-1800 as "moderately concentrated," and a market above 1800 as "highly concentrated." See DOJ/FTC Merger Guidelines at §1.51.

21. Market power cannot be adequately assessed by mere reference to market shares, however, because other factors, such as barriers to entry, can influence the degree to which market share conveys market power.[38] As a result, in addition to market share and concentration, the conditions of entry and other structural features in each market must be examined to determine whether the exercise of market power is possible.

B. Television Broadcasting's Relevant Markets

22. With the above principles in mind, we first turn to an identification of the product markets influenced by the rules under consideration. Some have argued that broadcasters "are in the business of producing audiences."[39] Commercial broadcasters fund their activities by selling advertisers access to the audiences they produce. To do this, a commercial broadcast television station organizes and transmits a single schedule of video programming and advertising over the air. This activity involves broadcast TV stations in the purchase or production of video programming, the sale of video advertising, and the delivery of the bundled video programming (i.e., entertainment, news and advertising messages) to consumers with television sets able to receive its broadcast. In providing delivered video programming, any given broadcast station's signal is limited in its geographic reach. This creates an incentive for an organization, such as a broadcast network, to forge arrangements with more than one station so advertisers interested in reaching a national audience can do so. Also, in providing delivered video programming, broadcast television stations purchase, barter, or carry the video products of others (e.g., broadcast networks, syndicators). This activity means that broadcast TV stations exercise some influence on the program production market. As a result of the above points, we judge that TV broadcasters operate in three economic markets relevant to the rules under consideration: the market for delivered video programming, the advertising market, and the video program production market.

23. For each of these markets, as posited earlier, we need to delineate selected measures of their structure. Specifically, we need to identify what products are relevant substitutes for one another, who are suppliers of these products, what is the geographic scope of the relevant market, and how to measure market share for the different suppliers. It is these questions to which we now turn for each of television broadcasting's relevant markets.

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[38] See Oahu Gas Serv., Inc. v. Pacific Resources, Inc., 838 F.2d 360, 366 (9th Cir. 1988) ("A high market share, though it may ordinarily raise an inference of monopoly power, will not do so in a market with low entry barriers or other evidence of a defendant's inability to control prices or exclude competitors."), cert. denied, 488 U.S. 870 (1988) (citations omitted); see also United States v. Syufy Enterprises, 903 F.2d 659, 664 (9th Cir. 1990); Hunt-Wesson Foods, Inc. v. Ragu Foods, Inc., 627 F.2d 919, 924 (9th Cir. 1980), cert. denied, 450 U.S. 921 (1981).

[39] B. M. Owen and S. S. Wildman, Video Economics, Harvard University Press (1992) at 3.

C. The Delivered Video Programming Market

24. Delineation of Relevant Substitute Products and Suppliers. To identify the relevant substitutes to delivered video programming, we must recognize that Americans can spend their leisure time doing other activities. A list of possible uses of a consumer's time is provided in Appendix C. The data reported in Appendix C indicated that in 1970, Americans spent about 46.5% of their leisure time on watching television. In 1988, they spent about 45.3% of their leisure time on watching television. The stability of Americans' use of television as a leisure activity suggests that video programming seen on television may be a sufficiently different economic product from other entertainment that it should be treated as a separate product market.[40] However, parties are requested to comment on this view and supply data and/or analysis which demonstrates the economic relevance of their proposed substitutes for delivered video programming.

25. Turning to an identification of economically relevant suppliers, we are confronted by a more difficult demarcation of this market. Public broadcast station operators clearly compete with commercial broadcast television operators for viewer attention. The number of broadcast television stations has increased substantially in recent years. In 1984, there were 1,180 commercial and noncommercial television stations, in 1994, there were 1,520.[41] Consequently, there has been an almost 30% increase in the number of television stations since the last time the television ownership rules were modified.

26. Cable system operators have also grown over this time period in importance as a group of suppliers of delivered video programming. At present, cable systems pass nearly 96% of all U.S. households, and 62.5% of U.S. TV households (approximately 59 million households) subscribe to cable services.[42] The number of cable video networks and the

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[40] This is because the prices, either explicit or implicit, of delivered video programming and other leisure activities can be assumed to vary over this eighteen year period and yet the quantity demanded of delivered video programming has remained stable. This suggests that these activities are economically distinguishable products/services (i.e., their cross-price elasticities are low).

[41] Broadcast Station Totals as of September, 1984. FCC News Release (released October 12, 1984). Broadcast Station Totals as of September 30, 1994, FCC News Release (released October 12, 1994).

[42] Implementation of Section 19 of the Cable Television Consumer Protection and Competition Act of 1992 - Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming (hereinafter Cable Competition Report), CS Docket # 94-48, __ FCC Rcd __ (September 28, 1994)), at ¶¶ 18, 100. Since 1984, when the broadcast television ownership rules were last revised, the subscriber penetration of the cable industry has increased from 43.7% to 62.5%. Id.

channel capacity of cable systems continue to grow dramatically.[43] However, even among those households subscribing to cable, retransmitted broadcast network signals had a 46% prime time viewing share in the 1992-93 season, while retransmitted independent broadcast and public television stations maintained 17% and 3% shares respectively.[44] Therefore, more than half of all viewing hours in cable households during the 1992-93 season were of retransmitted broadcast signals. In addition, more than one-third of all households that could subscribe to cable elect not to do so.[45] High profile sporting events that people watch, like the Super Bowl, the NBA Championships, the NCAA basketball championships, and the World Series (when played) remain on broadcast television.[46] Because some consumers choose not to purchase cable service, the degree to which cable TV channels are substitutes for broadcast television channels is an issue on which the Commission requests specific comment.

27. In addition to cable, there are now several emerging for-subscription multichannel providers of video programming which may compete with broadcasters in the same manner as cable. As described in detail in the recent *Cable Competition Report*, many consumers can now subscribe to a "wireless" cable ("MMDS") service, purchase a home satellite dish ("HSD"), and subscribe to direct broadcast satellite ("DBS"). In 1994, 143 MMDS systems served 550,000 subscribers.[47] Currently, satellite master antenna television ("SMATV") systems serve approximately one million subscribers,[48] and about four million television households own a home satellite dish.[49] In 1994, DBS providers began operating, with providers and equipment manufacturers optimistic about potential subscriber growth. DirecTV and United States Satellite Broadcasting ("USSB") predict that by the end of 1994, equipment will be available in approximately 10,000 locations with unit sales reaching 1,000,000 by the summer of 1995.[50] Further, USSB estimates that in seven years, almost 40% of all television

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[43] See Cable Competition Report, Appendix C, Tables 2-4.

[44] "Viewing Shares Broadcast Years 1983/84 - 1992/1993," Cable Television Developments (National Cable Television Assoc.), Apr. 1994, at 5-A (citing A.C. Nielsen Co. statistics).

[45] See Cable Competition Report, Appendix C, Table 1.

[46] Implementation of Section 26 of the 1992 Cable Act -- Inquiry into Sports Programming Migration, Final Report, 9 FCC Rcd 3440, 3501 (1994).

[47] Cable Competition Report at ¶79.

[48] Cable Competition Report at ¶92.

[49] Cable Competition Report at ¶73.

[50] Cable Competition Report at ¶66.

households may receive programming *via* DBS.[51] Finally, in the future, consumers may be able to receive video entertainment through their telephone lines -- twenty-four applications have been filed with the Commission by local exchange carriers seeking video dialtone ("VDT") authorizations which would cover a total of 8.5 million households.[52]

28. Another possible competitor in the delivered video programming market is the use of a videocassette recorder ("VCR"). VCRs allow viewers to see programs at times other than when they are broadcast and also permits viewers to choose pre-recorded tapes *in lieu* of watching whatever is on television that evening. VCR penetration has continued to grow -- at present, over 80% of U.S. TV households own a VCR.[53]

29. While all the above listed alternative suppliers currently provide some amount of delivered video programming, we will tentatively include, for purposes of this FNPRM, commercial broadcast television operators, public broadcast television station operators, and cable system operators to be economically relevant alternative suppliers of delivered video programming. While we wish to tentatively include some of the other suppliers (e.g., MMDS, DBS, VDT, etc.) in our demarcation at this time, we concede that it may not be appropriate to include them because their current market penetration is so low that they are not relevant substitutes to a majority of Americans. However, this situation may rapidly change, especially as a result of the Commission's regulatory stance towards encouraging entry into the delivered video programming market through other delivery media. Therefore we seek comment on which of these suppliers we should include in our demarcation.

30. Finally, while VCRs are present in a large number of television households, they do not provide a complete schedule of video programming and so are treated as sufficiently different as to suggest that perhaps they should not be included at this time.[54] However, we ask commenters to provide information on the degree of economic substitutability of all the alternatives considered above to a broadcast TV station's video programming. In submitting comments, we request that commenters provide evidence on the extent to which these are economically relevant substitutes as demonstrated by their cross-price elasticities of demand

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[51] Cable Competition Report at ¶70.

[52] Cable Competition Report at ¶104.

[53] Kagan Media Index at 14.

[54] To some extent VCRs complement rather than substitute for broadcast or cable video programming (e.g., many people tape such programming for viewing at a more convenient time). This makes the treatment of VCRs as an economically relevant substitute for broadcast television more problematic. See J. D. Levy and P. K. Pitsch, *Statistical Evidence of Substitutability Among Video Delivery Systems* in E. M. Noam (editor), Video Media Competition: Regulation, Economics, and Technology, for evidence on how VCRs complement the delivered programming of broadcast television stations.

and supply, or other evidence.

31. Delineation of the Market's Geographic Scope. As discussed above, the geographic scope of the relevant market is defined by the geographic area to which buyers will reasonably turn and from which competing suppliers sell their products.[55] Since commercial broadcast television stations have a limited signal range, it appears that, from these operators' perspective, the "area of effective competition" is geographically limited to a "local" area. This suggests that commercial broadcast television operators compete in a "local" market for delivered programming. However, the alternative suppliers that might be included in the product market have different service areas. Cable operators, for example, operate at a local franchise or system level, and are increasingly becoming composed of regional clusters.[56] In addition, many cable systems are owned or managed by cable multiple system operators ("MSOs"), which might operate these local franchises at a national level.[57] Wireless cable and SMATV systems may serve entire metropolitan areas, and a video dialtone service offered by a local exchange carrier may eventually serve an entire geographic region of the country. DBS service providers operate on a national level.[58] Therefore, while we will assume that the market for delivered video programming is primarily local, since most providers operate locally, we recognize that as competition and technology change the geographic reach of the relevant competitors, our notions of the geographic scope of the market for delivered video programming may change.

32. Earlier comments suggested several alternatives for defining the boundaries of the "local" market for delivered video programming. They were a television station's predicted Grade A contour, its predicted Grade B contour, its Metropolitan Statistical Area (MSA), and its Area of Dominant Influence (ADI) or Designated Market Area (DMA).[59] Grade A and Grade B contours represent geographic delineations based upon the predicted field strength contours of a broadcast television station. While in the past, the Commission has used the

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[55] See Tampa Electric Co. v. Nashville Coal Co., 365 U.S. 320, at 330-33 (1961).

[56] Cable Competition Report at ¶¶ 52, 151-55.

[57] See Cable Competition Report at ¶¶ 137-56 (discussing nationwide level and implications of cable MSOs).

[58] Cable Competition Report at ¶ 53.

[59] For a definition of the Grade A and Grade B contours, see 47 CFR §73.684. Metropolitan Statistical Areas are defined by the Census Bureau as zones of common economic interests. Areas of Dominant Influence are defined for all broadcast stations on a county-by-county basis by Arbitron to facilitate transactions between advertisers and those broadcast stations. Designated Market Areas are defined by A. C. Nielson and are analytically similar to the ADI. Since Arbitron no longer updates its ADI lists, we propose to use DMAs in our future analysis of this issue.

Grade B contour to define a local market, prior comments tended to suggest the use of either the smaller geographic area definition (the Grade A contour) or the larger geographic area definition (the DMA). The benefit of the Grade A contour definition is that it covers less area than the Grade B and thus better represents the quality of signal necessary for television stations to compete effectively. The benefit of the DMA definition is that it attempts to capture the actual television viewership patterns and each county is assigned to a unique television market, unlike the Grade A and Grade B contour standards which ignore the carriage of broadcast signals over cable systems.

33. We propose to continue to rely on a contour overlap standard but will consider the DMA definition of "local" for determination of the relevant geographic dimensions of the market for delivered programming. However, we request further comment on the use of the DMA definition of the geographic scope of these markets. Are DMAs equally applicable for alternative distributors such as cable? Are they too large?

34. Choice of Market Power Measurement. To determine whether market power exists, we must also determine how to measure market concentration within the local delivered video programming market. There are four different measurement scales that were frequently mentioned in earlier comments. They are: (1) the number of separately owned stations or outlets,[60] (2) the audience share of the separately owned stations or systems, (3) the number of available channels,[61] and (4) the audience share of the separately available channels. We tentatively propose to use the number of separately owned stations or outlets serving a market as our unit of measure. We use this unit of measure because it is consistent with prior Commission practice and minimizes the variability of measurement due to fluctuations in the popularity of an outlet's programming. However, we recognize its potential limitations and would like additional comment on which of these four measurement scales should the Commission use. Specifically, if we were to use the audience share of the separately available outlets or channels, how should we address the variability this introduces into our television station ownership rules because of changes in the number of outlets or channels offered and the popularity of those outlets' or channels' programming over time? Further, if we were to count the number of available channels, how should mandated-access channels on cable systems be included?[62] And finally, we invite comment on the condition of entry and other structural features of this market that influence the existence and exercise of market power.

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[60] This would treat a cable operator as just one more alternative provider.

[61] This would treat a cable system as contributing many channels of video programming, even though all the channels are on the cable system which is owned by one entity.

[62] See, e.g., 47 U.S.C. §§ 531 (reservation of cable channels for public, educational and governmental use), 532 (reserving up to 15% of activated channels on a cable system for leased access), 534-35 (must-carry requirements for local and noncommercial broadcast stations).

D. Advertising Markets

35. TV broadcasters operate in two advertising markets -- national and local. The basis for this distinction rests on the following observations. For reasons discussed earlier, all TV broadcasters are limited in the geographic area for which they can supply advertising services. The substitutes available to an advertiser desiring national coverage may be different from those available to an advertiser desiring local coverage. While individual broadcast television stations sell advertising spots to national advertisers, much of the video advertising directed toward national audiences is sold or bartered by either broadcast networks or syndicators. Consequently, we will assume that broadcast television stations operate in two advertising markets.[63]

1. National Advertising Market

36. Delineation of Relevant Substitute Products and Suppliers. In Appendix D, we present data from McCann-Erickson, Inc. on the distribution of advertising revenues by media and year for the last several years. Examination of these data suggests that video advertising is the mass medium of choice for advertisers wishing to reach national audiences.[64] Unfortunately, we have no clear evidence on the degree to which all the other alternatives listed in this Appendix are economically relevant substitutes for video advertising. One study finds some substitutability amongst some of these alternatives, but also finds a significant degree of price inelasticity for each alternative considered.[65] Consequently we will tentatively consider video advertising an economically distinct segment of the national advertising market. However, we solicit any evidence that commenters can provide which demonstrates that some of the other alternatives provided in Appendix D are economically relevant substitutes for video advertising in the national advertising market.

37. We believe that the primary suppliers of video advertising in the national market, as suggested by Appendix D, consist of the broadcast networks, program syndicators, cable

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[63] See Owen and Wildman, supra note 39, at 11-13 for further discussion of this view that there "are two distinct advertising marketplaces: national advertising and local advertising."

[64] This point is also made in a story on broadcast networks in the Washington Post, October 31, 1994, at A10.

[65] B. J. Seldon and C. Jung, Derived Demand for Advertising Messages and Substitutability among the Media, 33 Quarterly Review of Economics and Finance 71 (1993). Price elasticity is a measure of the responsiveness of a demand for a product or service to changes in its price.

networks,[66] and perhaps cable multiple system operators (MSOs). The broadcast networks sell national advertising time for their television affiliates, and, according to the McCann-Erickson estimate, approximately 74 percent of the national video advertising expenditures go to network advertising. We tentatively exclude individual broadcast television stations' and cable system operators' sale of advertising to media buyers (i.e., spot sales) from this market because spot sales of advertising to national advertisers are frequently made to allow the national advertisers to reach a more targeted geographic focus and not to reach a national audience (e.g., selling trips to the Bahamas to persons in the snow belt during January). Further, at this time, we do not include wireless cable operators, DBS operators, or VDT operators because they do not presently provide appreciable amounts of national advertising. However, we solicit evidence which would demonstrate that we have either included too many or too few alternative suppliers of national video advertising.

38. Delineation of the Market's Geographic Scope. As stated earlier, we view the national advertising market as distinct from the local advertising market. By its very characterization, we view this as advertising directed to a national audience, and hence national in its geographic scope.

39. Choice of Market Power Measurement. To measure market share for the purpose of discerning the concentration of this market, we propose to use advertising revenues. However, we invite suggestions of alternative measures which might be better indicators of market share in the national video advertising market. These suggestions should also address the availability of data necessary to use the measure. And finally, we invite comment on the conditions of entry and other structural features of this market that influence the existence and exercise of market power.

2. Local Advertising Market

40. Delineation of Relevant Substitute Products and Suppliers. Advertisers wishing to reach a "local" market are not necessarily limited to video advertising. As the McCann-Erickson Inc. data in Appendix D demonstrates, an advertiser wishing to get its message to a local market appears to have, in addition to video advertising, the following options: radio

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[66] This is advertising time sold by national cable programming networks to national advertisers. The Commission notes that cable networks do not reach all television households because not all households subscribe to cable and not all cable operators provide all cable programming networks. However, the Commission believes that cable network advertising should be included in the national market, recognizing that the less-than-national coverage is probably reflected in advertising rates. We request specific comment from parties as to whether this category on the chart in Appendix D includes advertising sold by cable multiple system operators (MSOs) for advertising on their various systems. If this category does not include MSOs sales, we request input as to the magnitude of such sales and whether these sales should be included in this national video advertising market.

(spot and local), newspapers (local), magazines (regional magazines, and regional editions of national magazines), direct mail, outdoor/billboards, and yellow pages. For these options, we would like commentors to discuss the following issues. To what extent do advertisers regard radio advertising as a substitute for local broadcast television advertising? To what extent do advertisers regard local newspaper advertising as a substitute for local broadcast television advertising? If local newspaper advertising is a substitute for TV advertising, should all newspaper advertising be included or should classified advertising be excluded? Finally, do advertisers seeking to reach a local market find regional magazines/regional editions of magazines, direct mail, outdoor, and yellow pages to be acceptable substitutes for local broadcast television advertising?

41. More generally, to help the Commission draw the boundaries of the local advertising market relevant to the rules under consideration, we request commenters to provide answers to two questions. First, how do advertisers seeking to reach a local market view the above-listed alternatives and how do they make their decisions on which media to use? Second, how do these advertisers react to changes in the price of advertising on one medium relative to another that the commenter thinks is a relevant substitute? For this last question, commenters are requested to quantify the cross-price sensitivity of the proposed substitutes.

42. Turning to video advertising, a local broadcast television station sells advertising time to a variety of advertisers, both national and local in scope, who wish to reach its local market. If that broadcast TV station raises its advertising rates, the advertisers that buy time on that station have several reasonably interchangeable alternatives by which to get their message out. First, they could buy time on another broadcast TV station serving the same local market. Second, they could buy time through the local cable operator. This option is growing in importance, as the recent surge in cable operator advertising revenues demonstrates. In addition, cable operators have started using "cable interconnects" -- regional consortia of cable systems that sell spot advertising for all cable systems in a metropolitan area.[67] The growth of cable system "clustering" is also likely to enhance cable's ability to sell local advertising. And as other regional or local distribution media grow, such as wireless cable, SMATVs and VDT, the number of outlets for firms desiring local video advertising grows as well.

43. For the purpose of further discussion, we will tentatively consider the local advertising markets to include video advertising, radio advertising, and newspaper advertising. For video advertising, we will tentatively include local cable operators as an alternative supplier of video advertising to broadcast television station operators. We will treat other

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[67] See, e.g., Linda Moss, TV Stations Lobby Against Cable for Political Ads, Multichannel News, September 5, 1994 at 3, 20; Linda Moss, Vendors Hit Bumpy Road with Advertising Pipeline, Multichannel News, October 10, 1994 at 3; Linda Moss, Top 10 Markets Eye Similar Ad Upgrades, Multichannel News, August 8, 1994.

alternative suppliers as not presently significant enough economically to constrain the exercise of economic power by a broadcast television station in selling local advertising. However, we are open to economic analysis which demonstrates that this view of the relevant substitutes and suppliers for the local advertising market is too narrow.

44. Delineation of the Market's Geographic Scope. The essential issue is what is the "area of effective competition" TV broadcasters face in the sale of advertising? Earlier, we set out four geographic delineations for "local" in our discussion of the market for delivered video programming. To issues raised there, we add the following questions. Can there be two or more "local advertising markets" inside the Grade A or B contour or DMA of a broadcast station? Commenters are also requested to specifically comment on the effect of broadcast retransmission by cable on the advertising market. Does the fact that, for example, a person can watch Boston broadcast TV stations on the Albany, New York cable system have any impact on defining the geographic scope of a "local" advertising market? Finally, would the regulatory burden of using a different geographic delineation of market for local advertising from that of video programming delivery be justified by the gains in economic relevance? With this last point in mind, we nevertheless tentatively define the geographic scope of the local advertising market for any broadcast television station as the DMA that it falls within.

45. Choice of Market Power Measurement. To measure market share for the purpose of discerning the concentration of this market, we proposed to use advertiser revenues. However, we invite suggestions of alternative measures which might be better indicators of market share in the local video advertising market. These suggestions should also address the availability of data necessary to use the measure. Finally, we invite comment on the conditions of entry and other structural features of this market that influence the existence and exercise of market power.

E. The Video Program Production Market

46. Aside from advertising, TV broadcasters must organize a schedule of video programming, either produced by themselves or by others. This involves broadcast television stations in the program production market. The competitive concern about multiple ownership of television stations in this market is one of either *monopsony* or *oligopsony* power -- *i.e.*, the ability of one or several firms to artificially restrict the consumption of programming or price paid for programming.

47. Delineation of Relevant Substitute Products and Suppliers. The video program production market involves video products from movies to first-run syndicated television series. The products are readily distinguishable from other types of programming, like radio programming, and are therefore relevant substitutes. There are a number of sellers or suppliers in this market. Programs that are aired on broadcast television are produced by program production companies. To a certain extent, broadcast television networks also produce programs through their in-house production companies for broadcast through their

affiliates. Most television programs that are produced for the networks or independent stations are produced by the major movie studios, independent program producers (who often affiliate with a movie studio in order to produce the program), or syndicators.

48. Broadcast television stations are major buyers of video programs, who typically acquire the video programs they deliver to consumers in one of three ways. First, a broadcaster can affiliate with a broadcast network and obtain an entire package or schedule of programming directly from its network (the network "feed"). The network, in this regard, acts as a broker between the program supplier and its affiliated stations. Each of the three major networks distributes its programs to over two hundred television stations nationwide that are connected with the network by cable or satellite. For clearing its airtime for network programming, an affiliate is compensated according to the time of the day it clears time for network programming and the size of its potential audience. Networks encourage their affiliates to carry the entire network "feed" so as to maximize the audience they can sell to advertisers. Second, television broadcasters can also obtain programming from suppliers called "syndicators" -- national or regional entities that sell programming to television stations on a market-by-market basis. And finally, television broadcasters can produce their own programming. Network affiliates and independent stations both, in general, air locally-originated programming, primarily local news and sports programming.

49. Over the last 15 years the list of additional buyers of video programs for delivery to consumers has grown. For example, it now includes, in addition to broadcast television networks and syndicators, cable networks, cable operators, direct broadcast satellite operators, low power television stations, and telephone companies.[68] The increasing number of potential purchasers would seem to imply that there is competition among buyers of video programming and thus, concerns that television broadcasting companies exercise oligopsony power in the purchase of video programs have lessened to some extent. However, we solicit comment on the effect of nascent broadcast networks and these alternative buyers of video programming on competition in this market.

50. Delineation of the Market's Geographic Scope. The video programming production market is clearly national and perhaps international in scope, because television broadcasters obtain a large portion of their programs from national providers. The fact that television broadcasters produce some programming locally does not detract from the national scope of this market, because the television broadcasters could reasonably turn to national sources of supply for programming.

51. Choice of Market Power Measurement. We propose to use expenditures on video programming as the proper means of determining market shares for the purposes of examining

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[68] For a discussion of recent telephone company efforts to purchase video programming see Mike Mills, In Hollywood, Bells are Ringing, Washington Post (November 1, 1994) at D1.

the buying power of the relevant purchasers of video programming. Commenters are requested to discuss whether this is a proper measure for assessing the potential for oligopsony power in this market. And finally, we invite comment on the conditions of entry and other structural features of this market that influence the existence and exercise of market power.

F. Tentative Economic Conclusions

52. Above, we have reached a series of tentative conclusions about the three markets that broadcast television stations are involved in that are important to consider in the context of this FNPRM. We will assume these delineations of relevant substitutes and suppliers, geographic scope, and measures of market power for the market for delivered programming, the market for advertising, and the video program production market in subsequent analyses of the effect of broadcast ownership rules under consideration. To aid the reader, we set out the alternatives in Appendix E, and star those alternatives that we will tentatively use as working assumptions about the relevant markets in further discussion. Clearly these delineations should be the focus of comments on our competitive analysis of television broadcasting, and so are subject to change based upon comments and evidence received in response to the FNPRM.

53. In analyzing the economic effects of the rules under consideration, we assume the above product market descriptions, and focus upon the questions: (1) do we have any evidence of the abuse of market power currently (focusing upon prices in the different markets), and (2) will relaxing our current rules substantially increase the concentration of these markets to levels which raise concerns about the potential for the abuse of market power?

IV. DIVERSITY ANALYSIS OF TELEVISION BROADCASTING

54. The Commission has historically examined the effectiveness of its broadcast regulations in achieving diversity goals by primarily assessing the level of outlet diversity within the broadcasting industry, on national and local levels. That approach may be too narrow in today's world, in which the American public can receive home delivered video programming from a variety of outlets. Under such circumstances, it makes less and less sense to regulate a market on the grounds of ensuring diversity, without taking into account whether there is an available diverse array of non-broadcast media. That being said, we believe we need a new framework for assessing diversity, which takes into account the developments in the communications marketplace and that captures the rigor of our economic analysis.

55. In the sections that follow, we lay out our traditional diversity goals and approaches for achieving them, raise questions concerning new approaches for defining diversity, and seek comment on how to apply a framework for assessing the efficacy of our

broadcast regulations in achieving these goals. More specifically, Section A describes (a) the three types of diversity that our rules have attempted to foster -- viewpoint, outlet and source diversity, and (b) the two basic techniques the Commission has used to achieve these diversity goals -- direct means (such as nonentertainment programming guidelines) and indirect means (such as our structurally-based ownership rules). Then, in Section B, we discuss new approaches to our concerns with diversity. In the last two sections, we set forth possible methods for defining what markets should be evaluated to determine whether our diversity goals are being served by the particular broadcast regulation in question. Thus, Section C proposes a broadening of the "product" market that we have traditionally examined for diversity purposes, to go beyond just broadcast-delivered video programming received in the home. Section D suggests the geographic markets we would examine in determining whether our diversity goals are being furthered by the broadcast regulation in question.

56. Once we have determined the appropriate product and geographic markets that are relevant for assessing whether the diversity goals of a rule are being met, we will examine each rule at issue by (a) identifying which diversity goal or goals the rule seeks to foster (e.g., viewpoint, outlet and/or source), (b) determining whether the rule in fact fosters such goals in the relevant markets, and (c) deciding whether, in those markets, there is a need for continued regulation to maintain or increase existing levels of diversity.

A. The Traditional Diversity Goals and Methods for Achieving These Goals

57. Traditionally, at least as important as the Commission's concern about undue economic concentration among broadcast stations, has been its concern for ensuring diversity of viewpoints in the material presented over the airwaves. This notion is derived from the same concept that underlies the First Amendment. As the Supreme Court has said, the First Amendment "rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public...."[69] We have tried to ensure such diversity using two basic techniques -- one direct and the other indirect.

58. Our direct techniques have consisted of regulations specifically designed to act directly on the programming -- and, more particularly, the nonentertainment programming -- presented by broadcast stations. Even the earliest renewal forms promulgated by the Federal Radio Commission (the Federal Communications Commission's predecessor agency) required applicants to attach a printed program and provide information on the average amount of time devoted weekly to various types of programs, clearly conveying the impression that the FRC favored some types of programming.[70] Since then, other methods of direct regulation have

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[69] Associated Press v. United States, 326 U.S. 1, 20 (1945).

[70] See, e.g., 1928 Annual Report to Congress by the Federal Radio Commission, p. 161. The forms asked for information on the average amount of time on a weekly basis that

been used by the Commission. For instance, in 1949, the Commission adopted its Report on Editorializing by Broadcast Licensees which, among other things, stressed the duty of all licensees to devote a "reasonable amount of time" to the discussion of public issues.[71] Later, in 1960, the Commission adopted a policy that explicitly listed certain types of programming as being in the public interest.[72] Subsequently, it adopted nonentertainment programming guidelines mandating that applications proposing less than the guideline amounts could not be processed by the staff but, instead, would have to be brought to the attention of the full Commission.[73] Additionally, over time the Commission developed community ascertainment obligations that required broadcasters to familiarize themselves with the needs and interests of their communities and to offer some programming in response to those needs.[74] Currently,

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was devoted to: entertainment, religious, commercial, educational, agricultural, and fraternal programming.

[71] 13 FCC 1246, 1247 (1949). Also, in that Report, the Commission adopted Fairness Doctrine requirements. On August 4, 1987, in Syracuse Peace Council v. WTVH(TV), 2 FCC Rcd 5043 (1987), aff'd 867 F.2d 654 (D.C. Cir. 1989), cert. denied, 110 S. Ct. 717 (1990), the Commission decided to cease enforcement of the Fairness Doctrine after concluding that it no longer served the public interest.

[72] In its 1960 En Banc Programming Statement, the Commission listed 14 types of programming that it felt were in the public interest. They were: (1) opportunity for local self-expression, (2) the development and use of local talent, (3) programs for children, (4) religious programs, (5) educational programs, (6) public affairs programs, (7) editorialization by licensees, (8) political broadcasts, (9) agricultural programs, (10) news programs, (11) weather and market reports, (12) sports programs, (13) service to minority groups, and (14) entertainment programs. The following year, the Commission sought to further encourage news programming by prohibiting staff action on any application in which the applicant had either not broadcast or did not propose to broadcast any news. Notations of General Agenda, June 28, 1961.

[73] These guidelines were eliminated for television in 1984. See Report and Order in MM Docket No. 83-670, 98 FCC 2d 1075 (1984), recon. denied 104 FCC 2d 357 (1986), aff'd in part and remanded in part sub nom., Action for Children's Television v. FCC, 821 F.2d 741 (1987).

[74] A broadcaster's obligation to make a specific effort to understand the needs of its community was long a part of a broadcaster's duties. See, e.g., P.B. Huff, 11 FCC 1211, 1218 (1947). In its 1960 Programming Statement, 44 FCC 2303, 2316 (1960), the Commission firmed up this obligation stating that a licensee's obligation to operate in the public interest included its "diligent, positive and continuing effort...to discover and fulfil the tastes, needs and desires of his community or area for broadcast service." Formal ascertainment obligations were eliminated in the early 1980s in the Commission's radio and television deregulation proceedings.

the Commission has generalized requirements for both radio and television mandating the presentation of programming relevant to issues facing the broadcaster's community.

59. The direct technique of regulating viewpoint diversity has fallen out of favor. This is due to both changes in the marketplace -- chiefly, the large increases in the number of broadcast stations and in competition to broadcasting -- and to heightened concern over First Amendment issues. Accordingly, as indicated, most of our rules and policies employing the direct technique for ensuring viewpoint diversity have been eliminated.

60. The indirect method used by the Commission for obtaining viewpoint diversity has been through our structural rules. These attempt to increase the diversity of viewpoints ultimately received by the public by providing opportunities for varied groups, entities and individuals to participate in the different phases of the broadcast industry. There are a number of examples of structural regulations designed to have an impact on viewpoint diversity. For example, our ownership restrictions, including those limiting the number of stations that a person can own on both the national and local levels and those limiting the ownership interests that broadcasters may have in other media, are intended to assure that information is dispensed from "diverse and antagonistic sources."[75] Similarly, our licensing process has given incentives to those not yet involved in the broadcast industry by according a preference to those having fewer broadcast interests than their opponents in the comparative context, and our minority ownership and EEO policies are designed to encourage more participation in the broadcast industry by those historically under-represented in it.[76] Indeed, Congress' concern with diversity has led to its approval of the use of structural methods to assure both source and outlet diversity in cable television, as well. Section 11 of the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act") was adopted by Congress to address its concerns that the cable industry had become increasingly vertically integrated -- with common ownership of both programming and distribution systems -- and that, as a consequence, cable operators had obtained the ability to favor affiliated programmers and cable systems over unaffiliated or competing programmers and distributors.[77]

61. The indirect technique for encouraging viewpoint diversity (i.e., structural rules) fosters two other kinds of diversity that the Commission has regarded as integral to the ultimate goal of providing the public with a variety of viewpoints. First, certain of the Commission's structural rules, such as the ownership limits, promote "outlet" diversity, which refers to a variety of delivery services (e.g., broadcast stations) that select and present

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[75] Associated Press v. United States, supra at 20.

[76] Implementation of Commission's Equal Employment Opportunity Rules (MM Docket No. 94-34), 9 FCC Rcd 6276, (1994).

[77] See Second Report and Order in MM Docket No. 92-264, 8 FCC Rcd 8565, 8583 (1993)(citing H.R. Rep. No. 628, 102d Cong., 2d Sess., at 43).

programming directly to the public. Second, other Commission structural rules, such as the Prime Time Access Rule and the Financial Interest and Syndication Rule, were designed to foster "source" diversity, which refers to ensuring a variety of program producers and owners. The Commission has felt that without a diversity of outlets, there would be no real viewpoint diversity -- if all programming passed through the same filter, the material and views presented to the public would not be diverse. Similarly, the Commission has felt that without diversity of sources, the variety of views would necessarily be circumscribed.

B. New Approaches to Diversity

62. As indicated above, we have traditionally equated an increase or decrease in outlet diversity with a corresponding change in viewpoint diversity.[78] Accordingly, we have limited ownership of broadcast facilities on both the national and local levels. However, there is information suggesting that it may be possible to have a decrease in outlet diversity without a corresponding decrease in viewpoint diversity. For instance, in our earlier proceeding analyzing the national multiple ownership limitations, the record suggested that group television station owners generally allow local managers to make editorial and reporting decisions autonomously and that group-owned stations are more likely than others to editorialize.[79]

63. There are two schools of thought concerning the relationship between ownership and diversity. The one school holds that the more independently owned outlets there are, the greater the viewpoint diversity. This is the "51 stations provide more diversity than 50" approach to diversity as typified by the First Report and Order in Docket No. 18110.[80] A

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[78] See, e.g., First Report and Order in Docket No. 18110, 22 FCC 2d 306, 311 (1970), recon. granted in part, 28 FCC 2d 662 (1971).

[79] Report and Order in Gen. Docket No. 83-1009, supra at 31-37. Due to the nature of that proceeding, we had no data addressing local, rather than national, ownership issues. See also, Second Report and Order in MM Docket No. 87-7, 4 FCC Rcd 1741, 1744 (1989) recon. granted in part 4 FCC Rcd 6489 (1989). In the Second Report and Order we noted that CBS, in its comments, stated that in 45% of the instances in which CBS-owned television and radio stations in the same market made endorsements in electoral races from 1980 to 1983, they endorsed opposing candidates. Additionally, CBS noted other instances in which CBS-owned stations in the same market had taken different editorial positions on significant issues.

[80] "If a city has 60 frequencies available but they are licensed to only 50 different licensees, the number of sources for ideas is not maximized. It might be the 51st licensee that would become the communication channel for a solution to a severe local social crisis." 22 FCC 2d at 311. See also, Multiple Ownership of Standard, FM and Television Broadcast Stations, 45 FCC 1476, 1476-1477 (1964). For an overview of the Commission's concern with diversity, see generally, FCC v. National Citizens Committee for Broadcasting, 436

second school of thought concerning diversity posits that the greater the concentration of ownership, the greater the opportunity for diversity of content. Under this view, where there are competing parties, each of their strategies would be to go after the median viewer with "greatest common denominator" programming, leaving minority interests unmet. But where one party owned all the stations in a market, its strategy would likely be to put on a sufficiently varied programming menu in each time slot to appeal to all substantial interests.[81] While this model may, indeed, promote diversity of entertainment formats and programs, we question whether it would act similarly with regard to news and public affairs programming and ask commenters to address this point. Similarly, in our radio multiple ownership proceeding,[82] we found that greater concentration of ownership, especially on the local level, could enhance diversity by allowing stations that would otherwise go off the air to remain in service.[83] We ask commenters to address whether, in view of the current situation in the home delivered video programming market, the traditional school of thought concerning diversity, as described above, remains valid. If not, they should provide a description of the model that they feel more accurately provides an analytical approach and explain why they believe it to be preferred.

C. The Relevant Product Markets for Assessing Diversity

64. In adopting regulations having an impact on diversity, whether direct or indirect, we have traditionally limited our consideration to the situation present in broadcasting at the time of the regulations' adoption, without implicating other information/entertainment services.[84] More recently, we have begun to view the broadcast media, and particularly television, as being part of a wider media environment and have included them in our diversity analysis, at least in a general way.[85] We now believe it is unrealistic to consider broadcast television station ownership in isolation when analyzing

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U.S. 775 (1978).

[81] Steiner, P.O., Program Patterns and Preferences, and the Workability of Competition in Radio Broadcasting, Quarterly Journal of Economics 66 (1952):194-223. It is important to recognize that a monopolist may also engage in this kind of product differentiation in order to deter entry by potential competitors. See R. Schmalensee, Entry deterrence in the ready-to-eat cereal industry, Bell Journal of Economics 9 (1978): 305-327.

[82] See fn. 11, supra.

[83] 7 FCC Rcd at 2760-2761.

[84] There are a few exceptions to this general observation, including §§ 73.3555(c) (broadcast/newspaper cross-ownership prohibition) and 76.501 (cable/TV and cable/network ownership prohibitions).

[85] Amendment of Multiple Ownership Rules (Gen. Docket 83-1009), supra.

outlet diversity, and we propose to take other media into more specific account in assessing diversity. If consumers can choose from among several video programming services which they view as being substitutable for each other, an accurate analysis of outlet diversity must reflect that fact. In determining which services should be treated under our diversity analysis as substitutable, we first survey the universe of possibilities. As discussed above,[86] available outlets for video programming include broadcast television, cable television, telephone companies offering video dial tone service, MMDS, video cassettes and, increasingly, DBS. Approximately 62.5 percent of American households (i.e., approximately 59 million households) subscribe to cable.[87] VCRs are owned by over 80 percent of U.S. television households.[88] Additionally, computer networks and services, such as Internet,[89] Compuserve, America-on-Line, and Prodigy, increasingly provide access to information that, while not technically video programming, is still video-displayed and contributes to the total number of sources and outlets of information available to the public. Additionally, some consumers may view radio or newspapers as substitutes for television for some purposes.

65. Our next task is to determine which of the above media to include and how to weigh them, by identifying the relevant product. In the past, the relevant product has been relatively easy to discern: video service delivered to the home by over-the-air television. In terms of diversity analysis, this was the primary product that had to be considered.[90] Now, however, there are a myriad of other video media, and it is our duty, with the assistance of the record compiled in this proceeding, to determine which of these we should consider in determining the level of diversity our television ownership rules should achieve and the extent to which each medium should be considered. Section III, above, requested comment on the

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[86] See, e.g., ¶¶ 26 and 27, supra.

[87] Broadcasting and Cable, August 15, 1994, at 56; Cable Competition Report, supra at ¶ 101.

[88] Cable Competition Report at ¶ 135.

[89] As an example of the increased accessibility of Internet to consumers, the State of Maryland will soon provide free Internet access to all its citizens. Powledge, Information Highway Without Tollbooths: Maryland is the First State to Offer Free Access to the Internet, The Washington Post, June 23, 1994, p. A-1. This puts a vast universe of information and opinions on local, national, and world issues at the user's fingertips, and it is accessible within the home. Commenters may wish to comment on whether the services such as this one should be included in our diversity analysis. On one hand, it in some ways resembles television teletext. On the other, it is available only to those with computer access. In this regard, commenters should address whether it provides a service similar to that of broadcast stations and whether it competes against the other mentioned video outlets for the consumer's time and money.

[90] But see, e.g., §§ 73.3555(d) and 76.501(a) of the Commission's Rules.

degree to which these alternative video media should be considered as economic competitors to, or substitutes for, broadcast television. In the current section, we are soliciting comment on whether, and to what extent, these media should be considered as substitutes for over-the-air television from a diversity standpoint.

1. Arguments For and Against Including Specified Non-Broadcast Television Services in Our Diversity Analysis

66. Cable television clearly substitutes for broadcast television in many ways. Like broadcast television, it delivers video programming directly to the home. Certainly, cable provides similar entertainment programming and national and international news. However, unlike broadcasting, one must subscribe to cable.[91] And only approximately two-thirds of those having cable available subscribe. Also, and perhaps more importantly, cable television operators have fewer public interest obligations.[92] An over-the-air broadcast television station is required to provide programming responsive to issues facing its local community, afford equal opportunities to political candidates, and to provide reasonable access to candidates for federal elective office. These are bedrock public interest obligations retained by broadcast stations and involve interests central to the Commission's concern with diversity.[93] Cable's obligations in these regards are rather more limited.[94] Nevertheless, some cable systems do have origination cable channels that provide coverage of local issues. Similarly, pursuant to Section 611 of the Communications Act (47 U.S.C. § 531), many cable systems have public, educational and governmental ("PEG") access channels that provide programs of information, instruction and opinion to cable subscribers. While a cable operator is not required by the

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[91] Viewers may be said to pay for over-the-air television through their purchase of advertised products, a portion of the price of which reflects the cost of advertising -- including television advertising. Also, the consumer must first purchase a television set in order to receive over-the-air programming and allocate viewing time, at least part of which is likely spent viewing commercials. Thus, viewers pay several indirect costs in return for "free" television. However, they are not the sort of direct payment that must be made for subscription services.

[92] Cable television systems do have equal opportunity obligations pursuant to Section 315 of the Communications Act of 1934, as amended. See 47 U.S.C. §§ 315(c)(1). They do not, however, have any issue-oriented programming obligations comparable in magnitude to those of broadcast stations.

[93] When we talk about diversity, we generally are referring to diversity in the presentation of news and public affairs programming. While diversity of entertainment formats and programming is desirable, we have traditionally left it to marketplace forces to determine their appropriate availability and mix. See, e.g., Federal Communications Commission v. WNCN Listeners Guild, 450 U.S. 582 (1981).

[94] See fn. 92, supra.

Act to dedicate such channels, the Act does permit a franchising authority to establish requirements in a franchise with respect to the designation of PEG access channels.[95] Finally, Section 612 of the Act (47 U.S.C. § 532) provides for commercial leased access channels, which the cable operator must make available for lease by parties unaffiliated with it.[96]

67. Similarly, a plethora of other emerging video media exist that we may wish to take into account in considering whether a programming market is sufficiently diverse. As previously indicated, the Commission's recent Cable Competition Report detailed many video delivery systems either currently available or just on the horizon.[97] MMDS, DBS, SMATV, and VDT are all systems that are, or soon will be, providing video programming to the home.[98] Like cable, and, for that matter, broadcast television, these systems carry primarily entertainment programming. Some will offer national and international news but, with the exception of DBS, none have public interest obligations.[99] Furthermore, these are all

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[95] Additionally, the section contains provisions regulating the relationship between the franchising authority and the cable operator.

[96] Unlike PEG access channels, which the Act states may be provided for in a cable franchise agreement, leased access channels must be dedicated in varying numbers depending upon the number of activated channels in the cable system.

[97] See ¶ 64, supra.

[98] We are not including VCRs in our diversity analysis. While many available video tapes are informational and instructional, most are entertainment and few, if any, involve issues of immediate local concern, the type of issues that lay at the heart of our diversity interests. For this reason, we do not propose to consider VCRs as substitutable for diversity purposes. Commenters believing that VCRs should be considered may wish to provide information concerning the value of VCRs in addressing our traditional diversity concerns.

[99] Pursuant to the requirements of Section 25 of the 1992 Cable Act, 47 U.S.C. Section 335, the Commission has undertaken a proceeding (MM Docket No. 93-25) with the objective of imposing certain public interest obligations on providers of DBS video service. Specifically, Section 25 requires the Commission to apply political broadcasting rules to providers of DBS video service and to consider whether DBS service provides opportunities for furthering the goals of localism. Section 25 also requires that a "provider of DBS service" reserve 4 to 7 percent of its total channel capacity for noncommercial educational or informational programming and make it available to national educational programming suppliers upon reasonable prices, terms, and conditions as determined by the Commission. See Notice of Proposed Rule Making (MM Docket No. 93-25), 8 FCC Rcd 1589 (1993). After the Notice of Proposed Rule Making was released, a U.S. District Court held that the noncommercial carriage obligations of Section 25 of the 1992 Cable Act violate the First Amendment, but the court's decision has been stayed pending appeal. See Daniels Cablevision, Inc. v. United States, 835 F.Supp. 1 (D.D.C. 1993), appeal docketed No. 93-

subscription services. As is the case with cable television, this is a factor we must consider in weighing whether they can be considered for diversity purposes as substitutable for broadcast television.

68. Finally, we turn to radio and newspapers which, like television, are mass media sources of information, opinion and advertising. Radio has many of the attributes of television and, to that extent, may be substitutable for diversity concerns. Like television, radio is "free." Additionally, it has public interest obligations similar to television's. Radio also acts as an important source of information. Many radio stations have regular newscasts and a large number feature all news or partial news formats. Additionally, talk radio often provides an important source of information and opinion on local, national and international issues. Currently, there are 636 radio stations in the United States with an all news format, 820 with a news/talk format and 461 radio stations that have an all talk format.[100] Although some radio stations may have a news format, the visual dimension provided by a television broadcast can be so compelling as to overshadow even an in-depth treatment of the same issue by a radio station. This may account for people turning to television as their primary news source.[101]

69. Also, it may be appropriate to count newspapers, to some extent and in some contexts, as being a substitute for television stations for diversity purposes. The Commission has previously documented the important role played by newspapers in the country's marketplace of opinions in an earlier examination of the national ownership limitations. Additionally, our newspaper-broadcast cross-ownership rule (47 C.F.R. § 73.3555(d)) must be viewed as accepting that newspapers are in some measure substitutable for broadcast media for diversity purposes. "Prohibition of...newspaper and television, and radio and television cross ownership in the same market would make little sense unless these different media were important substitutes for each other."[102] However, newspapers have no public interest

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5290 (D.C. Cir.).

[100] Broadcasting and Cable Yearbook, 1994, supra at B542.

[101] More than 60% of American adults surveyed indicated that they use television as their primary source of news. The Roper Organization, "America's Watching: Public Attitudes Toward Television, 1991," (New York, 1992).

[102] Report and Order in Gen. Docket No. 83-1009, (National Multiple Ownership Limits), 100 FCC 2d 17, 25-26 (1984), recon. granted in part and denied in part, 100 FCC 2d 74 (1985). While we believe that these media may be substitutes as informational sources, we do not find them substitutable for every purpose. For instance, we would not find that they are substitutes in the delivered video programming market. See Section III(C), supra.

obligations similar to those governing broadcast stations.[103] Additionally, newspapers are less immediate than either of the broadcast media. If a person hears of a breaking news story, he or she can obtain additional information almost immediately through the broadcast media; but, unless it is available through the electronic media (e.g., Internet), he or she cannot simply "order up" a newspaper. Instead, he or she will have to await the next day's edition.

2. Tentative Conclusions on the Non-Broadcast Television Services to be Included in Our Diversity Analysis

70. It is our tentative belief that cable is a mature technology that is well-established and well-entrenched in the media marketplace. Moreover, because cable systems are franchised locally and because many have PEG access channels (and some have locally oriented origination news channels) we believe that the presence of a local cable system can play a role in any assessment of the local diversity market, at least under some circumstances. In no case, however, does it appear that we should count, for diversity purposes, each channel on a cable system as a substitute for a broadcast television station. By definition, all cable origination channels are subject to the exclusive control of the cable operator.[104] Being subject to control by the same person or entity, each such channel does not contribute to outlet diversity, or, under traditional analysis, to viewpoint diversity. Nevertheless, it may make sense to recognize a cable system as contributing more than a single television station because on a given system there may be a number of channels that, for diversity purposes, would each be a bona fide substitute for a broadcast television station. These substitutes would include PEG access and commercial leased access channels, which are not subject to the editorial control of the cable operator and, therefore, are net additions to diversity.

71. In sum, we believe that cable ought to be included as a substitute for television stations for diversity purposes. Although not subject to public interest obligations to the same extent as are broadcast stations, many cable systems, through PEG and leased access channels, and even locally originated cable news channels, provide service that contributes to outlet and source diversity and, accordingly, to viewpoint diversity. However, in order to determine the extent to which cable should be counted, commenters should address the weight we should give it. For instance, should we condition our counting of a system upon its having PEG or local news channels? Should each such channel count as a separate voice, or merely enable the cable system as a whole to be considered? If the former, are there other types of channels that should also be counted as contributing to diversity to the same extent as a PEG channel? Should we require a sufficiently high degree of cable penetration by a system before we count it for diversity purposes and, if so, what should that degree of penetration be?[105] Comment is

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[103] See, e.g., Miami Herald v. Tornillo, 418 U.S. 241 (1974).

[104] See 47 C.F.R. § 76.5(p).

[105] Additionally, should we consider as "penetration" the level of cable availability in a community or the level of subscribership?

invited in these regards.

72. We tentatively see no reason to include in our diversity analysis the other named electronic video media, such as MMDS, VCRs and VDT, as substitutable for a broadcast television station. None of these has nearly the ubiquity of cable and most do not have the capability for local origination that cable has. All provide similar entertainment programming; however, our core concern with respect to diversity is news and public affairs programming especially with regard to local issues and events. This core concern does not seem to be addressed by any of these media.[106] It currently appears to us that the presence of these media in a market has little more relevance to our diversity concerns than would the presence of motion picture theaters in that market. Of course, commenters may wish to supply us with evidence to the contrary. But, based on the present state of our knowledge, none of these currently appear to have the availability or subscribership or programming that would enable us to conclude that for diversity purposes they are substitutable for broadcast television.

73. Next we turn to the issue of whether radio and daily newspapers should be included in the mix for diversity purposes. A case can be made for considering both radio and newspapers to be substitutes, to some extent and for some purposes, for broadcast television stations in terms of diversity. Both newspapers and radio provide their own unique contributions to the coverage of news and public affairs, especially with regard to the more in depth coverage they often can offer with respect to some issues. And, although newspapers are not as immediate as the broadcast media, they do have the capacity for more detail. Also, though not required to do so, newspapers seem to provide access to information and opinion at least as extensive as television stations. Typically, local dailies cover local issues, endorse local candidates and provide a platform for the presentation of local opinion. While radio, of course, does not provide the visual impact of television, it can, especially through all news or news/talk formatted stations, provide more extensive coverage of news and opinion than is often the case with broadcast television stations. Also, local radio stations provide access to information and opinion on issues of local concern that can be the equivalent of that presented by a television station. Most markets appear to have news, news/talk or talk formatted stations to which consumers may tune for information and opinion. For these reasons, both radio and newspapers could be considered to some extent as substitutes for television, at least for diversity purposes.

74. Although neither radio nor newspapers should be disregarded as competing media for television we, nevertheless, cannot consider each radio station, or each newspaper, as being the equivalent of a broadcast television station for diversity purposes. Television is:

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[106] Although DBS will have certain public interest obligations mandated, they doubtless will not be able to include local coverage. Nor would they yet have subscribership anywhere near that of cable television. Should future events warrant, we would be willing to revisit our views with respect to DBS.

1) more immediate than newspapers; 2) has public interest obligations not shared by newspapers; 3) has more visual impact than either newspapers or radio; and, 4) is used by more people as their primary news source than are either radio or newspapers.[107] And while there may be a number of news and news/talk format radio stations, counting only such stations as being fungible with television stations would not square with our traditional approach to format regulation.[108] Additionally, it would create the paradox of counting for diversity purposes only radio stations that present a particularly high volume of news while any television station would count as a "voice" notwithstanding what may be its minimal efforts to meet its public interest obligations. Also, while each television station and, for that matter, radio station has a legal obligation to address issues facing its local community local daily newspapers do not. While neither radio stations nor newspapers appear to be fungible for television stations for diversity purposes on a one-for-one basis, commenters may wish to provide their views as to the extent to which we should count these media in our diversity analysis.

D. The Relevant Geographic Markets for Assessing Diversity

75. It does not appear that there is a single geographically relevant market for diversity purposes. Instead, the relevant geographic market depends upon the nature and intent of the particular ownership rule under scrutiny. For example, for purposes of the national ownership limits, the relevant geographic market to be examined would be the nation as a whole. That is, the question to be asked is whether there is sufficient diversity of outlets in the nation as a whole that the twelve station limit is too restrictive, or not restrictive enough.

76. For the duopoly rule, the relevant geographic market is more restricted. The examination of diversity would be limited to, for instance, the area reached by a station's Grade B signal contour or whatever area we determine is appropriate and capable of being applied in an administratively convenient fashion. In no case, however, would the relevant geographic market for local diversity concerns be the same as that used for examination of the national ownership limits.

77. Diversity on the national level has been part and parcel of government concern since the inception of broadcast regulation. In adopting the Radio Act of 1927, the predecessor to the Communications Act of 1934, under which we operate today, Congress was, in part, motivated by the existence of the "Radio Trust," a comprehensive, vertically

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[107] See fn. 101, supra.

[108] While diversity of entertainment formats and programming is desirable, we have traditionally left it to marketplace forces to determine the appropriate availability and mix of such programs. See Federal Communications Commission v. WNCN Listeners' Guild, 450 U.S. 582 (1981).

integrated combination of electronic media related companies. Congress feared that, absent regulation, these companies would completely monopolize radio broadcasting. It feared that the "Radio Trust" was "hooking up stations in every community on their various wave lengths with high-powered stations and sending one program out, and they are forcing the little stations off the board so that the people cannot hear anything but one program."[109] This came at a time when there were only 536 broadcast stations nationwide so that most consumers had a severely circumscribed choice of programming available. Limiting ownership on a national basis would assure that there would be strict limits on the ability of the "Radio Trust" to propagate a single point of view to the American public as a whole. In spite of a sea change in the media marketplace over the last 60 years, we remain committed to diversity on the national level.

78. While we are no longer concerned that a "Radio Trust" will dominate broadcast communications, we still believe it essential to consider national ownership diversity, in large measure because of the resulting impact it has on diversity at the local level. The reasons for seeking diversity on the local level are readily apparent. Monopolization on the means of mass communication in a locality assure the monopolist control of information received by the public and based upon which it makes elective, economic and other choices. Measures to prevent such control have taken the form of our duopoly and one-to-a-market rules and our newspaper/broadcast cross ownership rule, all of which limit the ability of a single person or entity to control local organs of mass communication in a geographic locale.

79. Accordingly, as in our competition analysis, there is a geographic component to our diversity analysis. Not only must we determine which media generically are substitutable for broadcast television for diversity purposes but, also, where media outlets must be located in order to be considered. For instance, if we determine that from a diversity standpoint cable systems are to a greater or lesser extent substitutable for broadcast television stations, which cable systems should a particular television broadcaster be able to count? Should our standard be that the cable system has to be franchised to the broadcast station's community of license or be located in some part within the broadcaster's Grade A or Grade B signal contour?

80. Certainly, if we were to determine that cable television is substitutable for broadcast television for diversity purposes, it would not do to consider a cable system serving a far away market as being the equivalent of a local broadcast station. Similarly, a newspaper would have to have some nexus with the television broadcaster's market before we could allow it to count as a substitute for the local television for diversity purposes. We seek comment on what sort of standards we should adopt with respect to our local ownership regulations.

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[109] 68 Cong. Rec. 3031. (Statement of Sen. Dill, the Senate sponsor of what became the Radio Act of 1927.) See also, FCC v. Pottsville Broadcasting Co., 309 U.S. 134, 137 (1940); National Broadcasting Co. v. U.S., 319 U.S. 190, 219 (1943).

V. NATIONAL OWNERSHIP RULE

81. As described earlier, at present a company is limited to owning 12 broadcast TV stations nationally in different local markets and to a maximum aggregate 25% national audience reach.[110] The reach limit was added to the rule when the station limit was increased from seven to 12 stations. It was added in an attempt to resolve the problem that a rule based solely on station counts ignores the market size served by a station. The reach limit presently prevents a group owner from owning television stations in each of the 12 largest markets. The national networks and some other group owners have concentrated their station purchases on stations located in markets with the largest audiences. As a result of this strategy, some group owners have reached the 25% audience reach limit before they have acquired 12 stations.[111] Thus, it appears that for many of the existing national TV group owners, the 25% national audience reach limit is the more binding regulatory constraint on group acquisition of additional stations nationally.

82. To examine whether the national ownership limits should be relaxed, we first conduct a competitive analysis and then a diversity analysis. In conducting the competitive analysis, we seek to examine the effects of relaxing these rules on the potential competitiveness of the markets for delivered video programming, advertising, and video program production. The primary focus in each of these discussions is on the effect of changing the rules on the concentration of the market. In conducting the diversity analysis, we seek to examine the effects of relaxing these rules on the diversity of viewpoints available to the public, paying particular attention to the diversity of outlets.

A. Effects on the Market for Delivered Video Programming

83. Relaxing the national ownership limits will not by itself increase or decrease the number of separately owned broadcast TV stations in the video program delivery market. This is because, as discussed earlier, the video program delivery market is a local market. So, as long as a company is allowed to own only one broadcast television station in a local market, relaxing the national ownership limits will have no affect on the concentration of these local markets. Similarly, if we measure concentration in this market by the number of

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[110] These limits are increased to 14 stations and 30% if two or more of the stations are controlled by minorities.

[111] For example, in 1993, none of the top 25 television group owners had reached the number of stations limit, but several were clearly restricted by the national audience reach limit. For example, Capital Cities/ABC owns 8 stations with a 23.63% national audience reach. While able to add 4 more stations, they would clearly have difficulty adding one more station without violating the audience reach limit. Broadcasting and Cable (March 21, 1994) at 52.

available outlets or channels of delivered video programming, then relaxing the national broadcast television ownership rules should have no effect. Consequently, by these measures, relaxing the national ownership limits for broadcast television stations should not change the existing concentration of these local markets.

84. On the other hand, if we measure concentration in local markets by the audience share of each of the available channels of video programming, then relaxing national group ownership rules might have an effect on concentration of the different local markets for delivered video programming. This could occur because a group owned stations develop efficiencies in the acquisition or production of video programming which allows such stations to become more profitable and win larger viewing audiences. Such a consequence seems a desirable, rather than an undesirable, outcome of the competitive process, and therefore should not be a basis for maintaining current national ownership limits. We would like comment and evidence on the popularity of programming provided to consumers served by a group owner versus the popularity of programming provided to consumers served by an individual station owner, accounting for network affiliation (i.e., compare group versus individual for affiliated stations, group versus individual for non-affiliated stations).

85. Based upon the above considerations, we do not expect relaxation of the national ownership limits to have any effect on competition in the local market for delivered video programming. However, if commenters disagree with this expectation, we request that they provide evidence on how such a relaxation would increase concentration in these markets. For example, we would like commenters to justify their measure of concentration, provide a measure of it for existing markets, and detail the links between changes in the national ownership limits and concentration in these markets.

B. Effects on the Market for Advertising

86. One of the motivations for owning a group of TV stations nationally may be to increase a company's audience reach. This may give a company a chance to increase its bargaining power in the sale of video advertising time to advertisers in the national advertising market. However, as pointed out earlier, commercial broadcast networks, commercial cable networks and syndicators are the primary alternative providers of national advertising. Consequently, it is not clear why increasing national ownership limits should have any harmful effects on this market when these providers already reach a national audience.

87. On the other hand, there may be a potential for harm from increasing national ownership limits on the local advertising markets. A group owner might use any market power it might have in one local advertising market to subsidize anti-competitive efforts in another advertising market. However, given existing substitutes (e.g., other broadcast television stations, cable operators, radio operators, newspapers), it is not clear that any given broadcast television station possesses such market power, nor is it clear that such a strategy would even be profitable. Consequently, we do not expect relaxing national ownership limits

to have a deleterious effect on the different local advertising markets.

88. These expectations comport with prior analyses of video advertising, which find no evidence that group ownership had a significant effect on advertising rates.[112] While dated, we know of no recent analyses which demonstrate that a company owning a group of TV stations across the nation has and uses significant market power to charge higher advertising rates to national or local advertisers. However, we solicit any evidence on this issue, especially that which also takes into account other relevant factors in the pricing of video advertising. Further, we solicit comment on how relaxing the national ownership limits might affect the concentration of local advertising markets. These comments should provide measurement of existing concentration, as measured by advertising revenues, as a background for discussion.

C. Effects on the Video Program Production Market

89. Broadcast television stations purchase programming in a national market. Assume, for the sake of argument, that broadcast television stations face no other competitors than themselves. Nationally, there are 1,157 commercial broadcast television stations to which this rule applies. The current rule allows that, under certain circumstances, one person may hold an attributable interest in up to 14 commercial television stations nationally.[113] If all television station owners consolidated so that each controlled 14 stations, the Herfindahl-Hirshman Index (HHI), a common measure of market concentration, would be 121. This number is very low by antitrust standards.[114] Thus, even assuming that broadcast television faces no other competition in the purchase of programs, it would appear that the current national limits could be relaxed substantially before a competitive concern would arise.

90. With the relaxation, and likely future expiration, of the financial interest and syndication rules for broadcast television networks and the possible relaxation of prime time access rules, some will argue that there is the renewed potential for broadcast networks to exercise market power in the purchase of video programming. This view mixes concerns with broadcast networks's market power with television group owners's market power. However, two facts may mitigate the concerns evoked by this view. First, the ever growing list of

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[112] For examples, neither Cherington, et. al., (1971) nor Levin (1980) finds any evidence that the advertising rates between comparable group owned and individually owned broadcast TV stations are significantly different. P. Cherington, L. Hirsch, and R. Brandwein, Television Station Ownership: A Case Study of Federal Agency Regulation, Hastings House (New York, 1971). H. J. Levin, Fact and Fancy in Television Regulation, Russell Sage Foundation (New York, 1980).

[113] For purposes of this analysis we ignore the restrictions imposed by the reach limit, and we assume that groups have two stations which are minority controlled.

[114] Fourteen out of 1,157 constitutes 1.21 percent. $(1.21)^2 (1157/14) = 120.94$ (HHI).

alternative buyers of video programs suggests real limits on the exercise of any such power. Second, we have no evidence that broadcast television stations have monopoly power in their local markets for delivered video programming. Lacking such power, there is little way these stations could exercise market power in the purchase of video programs.[115] Consequently, we do not foresee that relaxing the national ownership limits for broadcast television stations will cause any significant economic harm to these markets.

91. The notion that group owned television stations lack market power in the purchase of programming is supported by available evidence. For example, the FCC's Network Inquiry Special Staff found no evidence that group owned stations were able to obtain programming from suppliers at more favorable terms than an individually owned station.[116] Consequently, we are unaware of evidence which suggests that any existing group owned broadcast TV stations exercise market power in the video program production market.

D. Other Economic Effects

92. Networks and group owners have indicated in their comments that there may be substantial economies of scale or cost savings from owning additional stations. However, they have not provided clear evidence that there are significant economies in the delivery of video programming which might accrue to the owner of a group of broadcast TV stations spread out across the country. When we increased the national limits from 7 to 12 stations, we stated that group ownership could have three beneficial effects. First, group ownership might foster news gathering, editorializing and public affairs programming, and the development of independent programming by regional or national ad hoc networks. Such improvements generate both programming preferred by consumers and more efficient use of the broadcast spectrum. Second, some buyers of stations may have superior skills. Those with superior managerial abilities may be able to do a better job of matching programming to local tastes. Third, some group owners may have cost advantages derived from the ability to spread the services of management, bookkeeping, secretarial, sales, and programming personnel over a number of stations, and the potential for group advertising sales and program purchases.[117] The empirical evidence about the magnitude of this effect was weak at the time we adopted the 12 station rule, and continues to be so today. Accordingly, we seek evidence and data concerning economies in the distribution of video programming which may accrue to group owners of television stations. We particularly seek evidence on this issue from those group owners who increased their ownership holdings in response to our prior relaxation of the national ownership limits. In providing this evidence, it would be particularly helpful if

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[115] See Sections III, A and IV, C for earlier discussion of this point.

[116] Federal Communications Commission, Network Inquiry Special Staff, *An Analysis of Television Program Production, Acquisition and Distribution*, in New Television Networks: Entry, Jurisdictions, Ownership and Regulation, Vol. II, October 1980, at 641-650.

[117] Report and Order in General Docket 83-1009, 100 FCC 2d 10 (1984) at ¶82.

commenters would distinguish between the effects of owning a group of stations and the effects of affiliating with a network.

93. Another economic effect of relaxing national group ownership limits might be on the rate of incorporation of technological innovation into television broadcasting. Larger group owners might have the financial capital and geographic diversification necessary to bear the costs and take the risks associated with introducing advanced television broadcasting technologies into existing television broadcasting stations. On the other hand, if the technological innovation is expected to be profitable, and financial markets will fund any profitable investment, then it is not clear why larger group ownership will increase the rate of introduction of new technologies in television broadcasting above what it would have been with the current rules. We would like comment on these views which help to evaluate their comparative validity.

94. Finally, another economic effect of relaxing national group ownership limits might be on the prices of broadcast television stations.[118] Such a relaxation could increase somewhat the number of potential bidders and hence the bid price for any non-group owned stations. The increased prices of broadcast TV stations may pose a concern with respect to the ability of minorities and other new entrants to acquire TV stations. However, it should be recognized that it is not the price per se that is the problem, but minorities' ability to finance the purchase of a higher priced station. We are concerned about this possible consequence and are addressing issues relating to the difficulties of minorities and women in obtaining access to capital in MM Docket No. 92-51[119] and in the minority and female ownership rule making we adopt today.[120] We are also concerned about the possibility that changes in the national ownership limits may adversely affect the pool of independent television stations available for acquisition and affiliation by nascent broadcast networks. We ask for comment and analysis of this concern.

E. Effects on Diversity

95. As we previously indicated, we will first identify which diversity goals the national ownership rule seeks to foster. One of the assumptions behind national television ownership limitations has been that placing limitations on the number of stations in which a

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[118] See G. Fournier and E. Campbell, *Shifts in broadcast policy and the value of television licenses*, 5 Information Economics and Policy 87 (1993). It is important to note that these authors claim to detect tremendous efficiency gains from group ownership. Unfortunately, however, they do not document their sources.

[119] In the Matter of Review of the Commission's Regulations and Policies Affecting Investment in the Broadcast Industry, 7 FCC Rcd 2654 (1992).

[120] Notice of Proposed Rule Making in MM Docket No. 94-150, FCC 94-324, __ FCC Rcd ___ (released January 12, 1995).

party can have a cognizable interest promotes diversity of outlets and viewpoints. This assumption, which dates from the inception of broadcast regulation, had as its genesis a fear that a small number of owners would dominate viewpoint diversity, keeping off the airwaves any views with which they did not agree. Limiting the number of outlets that an entity could own on a national level, the Commission has believed, increases the number of entities engaged in the ownership of broadcast facilities. This, in turn, limits degree of control over viewpoints expressed nationally that any entity could have and, as a consequence, furthers the First Amendment values in pluralistic national political discourse.[121]

96. While the national ownership rules may foster these goals, and especially outlet diversity, the rules may not be essential to achieving such diversity. It is axiomatic that if we limit the number of television stations nationally in which an entity can have an attributable interest, there will be more outlet diversity (i.e., more separate owners of television stations) than would be the case if, for instance, we allowed an entity to own an unlimited number of outlets nationally. But this does not necessarily translate into viewpoint diversity. Television and competing outlets are viewed locally, and we question whether an increase in concentration nationally affects diversity on the local level. In this regard, also, many stations are affiliated with a network. As a result, these stations, even though not commonly owned, air the identical programming for a large portion of the broadcast day irrespective of our national ownership limits. Moreover, the multiple sources and outlets of video programming currently -- and increasingly -- available now call into question the basic assumption that there are no close substitutes for over-the-air television. And, as seen above, there is evidence that group owned television stations are more likely than others to editorialize[122] and their local managers tend to make editorial and reporting decisions autonomously. This, at the least, suggests a reduced relationship between ownership diversity at the national level and viewpoint diversity especially at the local level. This lessens our diversity concerns with respect to liberalizing the national ownership cap and suggests that current limits on the number of television stations in which a single party may have a cognizable ownership interest nationally may no longer be appropriate.[123]

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[121] See, e.g., Notice of Proposed Rule Making, Multiple Ownership Rules (Gen. Docket No. 83-1009), 48 FR 49438 and sources cited therein.

[122] See para. 62, supra. Stations that editorialize, we believe, are contributing to the mix of ideas and, thus, are making a contribution to viewpoint diversity.

[123] The traditional basis for such ownership regulation has been the scarcity of electromagnetic spectrum space which limits the number of frequencies available to broadcasters. Given these limits, various regulations have been permitted in connection with the electronic media that would not be permissible in print media where spectrum scarcity is not an issue. See Turner Broadcasting System Inc. v. FCC, ___U.S. ___, 114 S.Ct. 2445 (1994); Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969). Although there is still limited television spectrum space available, it must be acknowledged that, irrespective of technological scarcity, the number of commercial and noncommercial television stations has

97. It appears that such factors as increased video media competition, network affiliation and diversity on the local level all favor alteration of the national ownership limitations. While our analysis suggests that, from a diversity standpoint, changes in the current national ownership limitations may be warranted, commenters should nevertheless address what effect, if any, group ownership and consolidation of ownership nationally would have on viewpoint diversity in news and public affairs programming, especially locally. For instance, do group owners tend to reduce the amount of news and public affairs programming by consolidating budgets and staffs, or does group ownership encourage more and better quality news and public affairs programming by providing access to more resources and allowing economies of scale?[124] Additionally, for national news, network affiliated stations primarily use their network affiliation to provide national news programming, and broadcast networks must compete with each other and with cable news networks in providing national news. Consequently, we ask whether changing national group ownership rules would have any impact on the delivery of national news and, if so, what that impact would be.[125] Finally, given that the pursuit of large audiences may drive all licensees -- whether group owners or not -- towards the exclusion of controversial, non-mainstream subjects from their programming, does ownership diversity, indeed, have a major effect on viewpoint diversity with respect to television?

F. Tentative Proposals

98. Based upon our review of the available evidence and literature, it appears to us that liberalization of the national ownership limits would not have an adverse impact upon competitiveness of the markets for delivered video programming, the market for advertising, or the video program production market. As already discussed, relaxing the national ownership limits will not increase the concentration of broadcast TV ownership within a local market. Further, the current national levels of industry concentration are low by antitrust

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continued to increase in the past decade from 1,180 in 1984, to 1,520 in 1994. Cable Competition Report, supra at ¶99. Contrast this with the comparatively stagnant level of daily newspapers which grew from 1,701 in 1985, to 1,735 in 1993. Bureau of the Census, Statistical Abstract of the United States 1993, Table 915, p. 567. It should also be noted that more than half of all households receive 10 or more over-the-air television signals (NPRM in MM Docket No. 91-221, supra at 4112), whereas few communities have competing daily newspapers; in a number of cases, maintenance of even this low level of newspaper competition has required Congressional exemption from antitrust laws.

[124] Information currently available to us suggests that affiliates spend almost four times the amount spent on news by independents. NAB, 1993 Television Financial Report.

[125] Intuitively, we believe that any impact would be positive. Ownership of more stations would, we believe, enhance the resources that a network or group owner could devote to its news operations.

standards. Therefore, extensive consolidations could take place before any competitive concerns would arise.

99. Nor do we believe that raising the national ownership limits would have serious adverse effects on diversity. As we have previously stated:

> Within the United States, the most important idea markets are local. For an individual member of the audience, the richness of ideas to which he is exposed turns on how many diverse views are available within his local broadcast market. For that individual, whether or not some of those views are also disseminated in other local broadcast markets does not affect the diversity to which he is exposed. Accordingly, national broadcast ownership limits, as opposed to local ownership limits, ordinarily are not pertinent to assuring a diversity of views to the constituent elements of the American public.[126]

100. Based upon these considerations, we propose raising national ownership limits and seek comment about the manner in which they should be expressed (e.g., number of stations or outlets, number of stations or outlets with a reach cap, reach cap without any limit on the number of stations or outlets, or audience share cap) and the extent to which they should be raised. We observe that in our 1984 Report and Order, using competition and diversity analyses similar to those discussed supra, we concluded that national ownership limits could be phased out without harming competition or diversity at the national level. Accordingly, we adopted a 12 station limit in that Order, with an automatic sunset provision whereby these limits would expire in six years. On reconsideration, we reaffirmed the numerical station limit, adopted the 25 percent reach limit, and eliminated the automatic sunset, recognizing that a complete and abrupt elimination of our national multiple ownership rules might engender a precipitous and potentially disruptive restructuring of the broadcast industry. We continue to believe that changes in the national multiple ownership rules should be incremental in order to avoid significant dislocation in the television industry. The NPRM in this proceeding proposed several adjustments to the multiple ownership rules, which we ask commenters to consider in the context of the analysis herein. We proposed amending the national numerical limit to permit common ownership of 18, 20 or 24 television stations and altering the national reach restriction to permit a group owner to reach 30 or 35 percent. Alternatively, we sought comment on whether we should modify only the numerical limit, retaining the 25 percent reach limit. We stated that this moderate approach would allow some growth in the size of group owners and provide us an opportunity to assess over time the benefits and any costs of increased station ownership. Commenters were mixed in their responses to each of these proposals and provided little structured analysis by which we could compare contrasting positions. Consequently, we ask for comments on these proposals which

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[126] Amendment of Multiple Ownership Rules (Report and Order), 100 FCC 2d at 37.

are structured in a manner consistent with the analytical framework proposed herein.

101. We also seek comment on the following new proposal. We could eliminate the numerical station limit entirely, and allow the reach limit to increase by some fixed percentage, such as 5% every 3 years, until the reach limit rises to 50%, the final limit. During this period, the Commission would monitor the relevant markets and determine whether or not problems have arisen which call for a halt in the relaxation of the national ownership limit.[127] This proposal would allow the Commission to take a measured approach to relaxing national television station ownership limits and would be framed in a manner consistent with our earlier analyses. Specifically, we think that formulating national limits only in terms of reach, rather than in conjunction with a number of stations limit, may be preferred because it captures the relevant dimension of interest (i.e., the total audience potentially available) and it allows companies flexibility to own either a few stations serving large population markets or a larger number of stations serving small population markets. This would mean that all licensees would be given the same opportunity to reach an equal share of the national audience. In addition to these advantages, we believe it would be desirable to allow the reach limit to rise gradually rather than immediately to 50%, in order to monitor industry changes. Parties are encouraged to comment on all the above proposals and any others they wish to suggest. We ask parties to analyze their benefits and costs in the context of relevant product and geographic markets and their impacts on both competition and diversity.

102. In applying the above to full power stations, we note that UHF stations are now attributed with only 50 percent of their theoretical reach within the ADI. In other words, acquisition of a UHF television station only adds half as much to a multiple owner's reach limit as the acquisition of a VHF television station located in the same television market. The Commission incorporated this adjustment in the 1984 rules to account for the physical limitations of the UHF signal. We seek comment on whether this adjustment should be retained. On one hand, improvements in UHF signal propagation and extensive cable carriage of UHF signals may have reduced the signal-quality disparity with VHF signals. On the other hand, approximately 5 percent of potential viewers are not reached by cable and 37.5% of television households do not subscribe to cable. These viewers must rely on over-the-air reception of UHF/VHF signals. Accordingly, we seek comment on whether and, if so, to what extent, there remains a disparity between VHF and UHF signal propagation and how this should affect the UHF discount, if at all. Should we determine that, based on the record, the UHF adjustment should be modified or eliminated, we would still be concerned that existing group ownership not be disrupted and we specifically would not intend to force divestiture by any such change. Therefore, we also seek comment on whether, should the UHF discount be

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[127] For example, the Commission might prepare a status report on the broadcast television industry prior to each change in the national ownership limit. We ask for comment on this idea and suggestions of alternative approaches to monitoring the effect of relaxing national ownership limits on the broadcast television industry.

modified, existing group owners should have the reach discount for any currently owned UHF stations "grandfathered," or whether this should be done only where divestiture would otherwise result from a new UHF reach rule that no longer reduced the theoretical reach by 50%.

103. As noted above, our current rule allows a single entity to hold interests in up to 14, rather than 12, televisions stations reaching 30, rather than 25, percent of total television households if the additional stations are minority controlled. In a separate and concurrent proceeding, MM Docket No.94-150, we are more fully considering a variety of issues related to minority ownership and participation in broadcasting, and parties may wish to comment in that docket. However, we welcome related comments which are particularly pertinent to issues raised in this FNPRM.

104. Finally, we note that a television station that qualifies as a satellite is exempt from the national ownership restrictions. This means that the satellite station does not count against the owner's national station limits.[128] TV satellite stations are full power terrestrial broadcast stations authorized under Part 73 of the Commission's Rules to retransmit all or part of the programming of a parent station that is ordinarily commonly owned. The Commission has an outstanding Second Further Notice of Proposed Rule Making, that seeks comment on the issue of whether this exemption should be continued, as well as on related issues such as whether some national ownership benchmark other than the number of stations would be preferable to apply to TV satellite stations.[129] Since we are now considering modifying all aspects of the national and local ownership rules in this proceeding, we believe it is appropriate to incorporate the outstanding proceeding on satellite television stations and resolve all ownership matters in this proceeding. In light of the new competition and diversity analysis presented in this FNPRM, we invite additional comment on whether satellite television stations should continue to be exempted from the national multiple ownership rules.

VI. LOCAL OWNERSHIP RULE

105. The local ownership rule prohibits common ownership of two television stations whose grade B contours overlap. The rule is intended to preclude ownership of more than one television station in a local community in order to promote competition and diversity. As we discussed earlier, television stations compete for viewership and sell advertising in local markets. Thus, it is important that the Commission's rules ensure workable competition in local markets. Ownership of several broadcast stations can increase the likelihood of

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[128] Coverage of satellite stations under our local ownership restrictions are assessed on a case-by-case basis.

[129] Second Further Notice of Proposed Rulemaking, in MM Docket No. 87-8, 6 FCC Rcd 5010 (1991).

anticompetitive behavior if (a) the stations serve the same market, (b) the market is concentrated, i.e., has few competitors, and (c) allowing ownership of several broadcast stations substantially increases concentration in the market.[130] In the following discussion, we will address the effect of relaxing the local television station ownership rule on our competitive and diversity concerns. We set out one specific proposal and request comment on other possible rule changes. For the above reasons, we view changes to the local ownership rule as giving rise to more serious concerns than changes to the national ownership rule. We intend to carefully evaluate the economic factors that affect the local marketplace, including changes that occurred after the NPRM was adopted in 1992. We will also look at how the proposal herein to modify the contour overlap rule from Grade B to Grade A is affected by other proposals in this FNPRM and how it and these other proposals influence the effects of allowing common ownership of broadcast television stations with contour overlap in local markets .

A. Effects on the Market for Delivered Video Programming

106. As we discussed earlier, we believe that, at present, commercial broadcast television station operators effectively compete with each other, with public broadcast television stations, with cable system operators, with wireless cable operators, and possibly with DBS operators serving their "local" market. Consequently, some existing large markets for delivered video programming appear to be unconcentrated when we use either the number of independent operators measure or the number of channels of programming measure for market share calculations.

107. Allowing one entity to own more than one broadcast TV station within a "local" market may permit the company to realize economies of scale, reducing the costs of operating the two stations. As we have stated in our proceedings relaxing other local ownership rules (i.e., radio ownership and the "one-to-a-market" waiver standard), joint ownership of stations in the same market permits cost-sharing in administrative and overhead expenses, sharing of personnel, joint advertising sales, and the pooling of resources for local program production (such as news and public affairs programming). We believe the cost savings from these economies could then be used to provide better programming to the public. We seek hard evidence from commenters of the existence and magnitude of such economies. We particularly seek information regarding the experience of those group owners who have consolidated pursuant to our relaxed local radio ownership rule and the one-to-a-market waiver standard. We also ask whether experiences with respect to the radio market can be used to predict the benefits of relaxing ownership rules in local television markets.

B. Effects on the Market for Advertising

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[130] S.M. Besen and L.J. Johnson, Regulation of Media Ownership by the Federal Communications Commission: An Assessment, Rand Publication #R-3206-MF (December, 1984).

108. Allowing a company to own more than one broadcast TV station in a local market might give the company the economic power to raise video advertising rates within the local service area, if, by virtue of the combination, the local market became concentrated. Evidence on whether significant market power in the local advertising market already exists is mixed. One study found that the relationship between advertising rates and broadcast concentration, for different measures of concentration, is either insignificant or negative.[131] This suggests that there is little evidence of market power being exercised by commercial broadcast television stations on local advertising rates. On the other hand, another study found evidence of a positive relationship between market concentration and CBS affiliate advertising pricing.[132] Consequently, prior evidence is mixed on whether commercial broadcast television stations possess any market power in the sale of advertising.

109. Allowing one company to own two broadcast television stations in a "local" market should have no effect on the concentration of the national advertising market because of differences in the geographic dimensions of these markets. However, allowing a company to own more than one broadcast television station within a "local" advertising market can increase that market's concentration. Local cable advertising revenues are small when compared to local commercial broadcast television station advertising revenues, but they are expected to increase in size and importance. Prior studies have found mixed evidence on the effect of cable on broadcast TV station advertising revenues.[133] Thus, at this time, it is not clear whether cable system operators offer effective competition to broadcast station operators in providing local advertising. Further, as was discussed earlier, it is not clear how substitutable radio and newspaper local advertising is for broadcast television local advertising. If they are effective substitutes, then many "local" markets would appear to be competive with respect to advertising. We request interested parties to provide whatever data

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[131] G.M. Fournier and D.L. Martin, *Does Government-Restricted Entry Produce Market Power?: Evidence from the Market for Television Advertising*, 14 Bell Journal of Economics (1983).

[132] M.O. Wirth and H. Bloch, *The Broadcasters: The Future Role of Local Stations and the Three Networks*, in Video Media Competition: Regulation, Economics, and Technology, Eli M. Noam (editor), Columbia University Press (NY, 1985).

[133] For contrasting examples, see (1) M.O. Wirth and H. Bloch, *The Broadcasters: The Future Role of Local Stations and the Three Networks*, in Video Media Competition: Regulation, Economics, and Technology, Eli M. Noam (editor), Columbia University Press (NY, 1985), and (2) M.O. Wirth and B.T. Allen, *Crossmedia Ownership, Regulatory Scrutiny, and Pricing Behavior*, 33 Journal of Economics and Business 28 (1980). Unfortunately, these studies are dated and fail to control for the popularity of program offerings. For example, adding one more cable channel to a 100-channel system might have a minor or major impact on the advertising revenue of an existing broadcast television station depending upon the popularity of its programming.

and analysis they can on the substitutability of these media in the local advertising market at present and in the future. Assuming that they are not effective substitutes, then we also request comment on how many independent providers of local video advertising are necessary to insure effective competition in this market. Statistical evidence supporting fact-based analyses from commenters will especially be welcome.

C. Effects on the Video Program Production Market

110. Television stations purchase or barter for video programming in a national market in the sense that producers of video programming typically create product which is marketed to be broadcast in more than one local market. However, the program market could be affected if Commission relaxation of the local ownership rules permitted one or a few broadcast station owners to exercise significant market power in the purchase of video programming. The result might be that suppliers of video programming would be forced to sell their product at below competitive market prices in order to gain access to the local market controlled by one or a few local group owners. Prior evidence suggests the potential for the exercise of such market power depends critically on the absence of a sufficient number of competitors. For example, the Network Inquiry Special Staff report examined the effect of an independent station on the prices paid for off-network syndicated programming.[134] It found that the price paid for programming per viewer is significantly higher where there is even one technically comparable independent station in the market in addition to the network affiliates.[135] The ever increasing number of alternative providers of delivered video programming in just about every major market, described earlier, may mitigate the potential for distorting the prices of video programming through control of broadcast access to local television sets by providing program producers with additional outlets for their product. We solicit comment on this point and evidence on the potential market power in the purchase of video programming in different markets if we were to relax the local ownership rule.

D. Other Economic Effects

111. As with relaxing the national ownership limits, relaxing local ownership limits could increase the price of broadcast television stations. The potential for increased prices of broadcast TV stations concerns us when we consider the ability of minorities and women to purchase TV stations. As we previously noted, the problem is the ability of such individuals to finance the purchase of a higher priced station. We are concerned about this possibility and are addressing issues relating to the difficulties of minorities and women in obtaining access to capital in the minority and female ownership rule making we are adopting today.[136]

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[134] See FCC, Vol II., op. cit., 643-50.

[135] FCC, Network Inquiry Special Staff, New Television Networks: Entry, Jurisdiction, Ownership, and Regulation, Vol. II, op. cit. at 643-50.

[136] Notice of Proposed Rule Making in MM Docket No. 94-150, supra.

We ask for comment and analysis of these issues.

112. We are also concerned about the possibility that changes in the local ownership limits may adversely affect the pool of independent television stations available for acquisition by and/or affiliation with nascent broadcast networks. Subsequent to the publication of the NPRM, the fourth network has flourished and the fifth and sixth networks are being introduced. Consequently, we solicit comment on the effects of allowing station ownership consolidation at the local level on the future development of these nascent broadcast networks. A separate, but related concern, is with allowing the owner of a station affiliated with or owned by an established broadcast network to own another broadcast television station serving the same market. This possibility may confer on such an owner more market power than would arise from an independent station operator acquiring a second station in the market. We solicit comment on the importance of this concern.

E. Effects on Diversity

113. As indicated previously, our concern with diversity is most acute with respect to local ownership issues. Both television and competing video outlets are viewed at the local level. The Commission has consistently believed that a reduction in local outlet diversity would translate into a reduction of viewpoint diversity.[137] While the existing duopoly rule may foster diversity by assuring that only one television outlet in a given market can be owned by a single entity or individual (assuring that each local television outlet is owned by a different person or entity), we believe it is appropriate to solict comments on whether the rule remains essential in its current form to ensure diversity.

114. In recent years the totality of information outlets on the local level has increased. Not only has the number of television outlets increased since our last review of the television multiple ownership rules[138] but, additionally, nearly all viewers now have access to cable television (whether or not they subscribe), and other video services. In our recent radio ownership proceeding, we found that the abundance of radio and other media outlets now available "make clear that the local marketplace is far more competitive and diverse -- indeed, has been virtually transformed -- since the local ownership rules were first promulgated."[139] On this basis, the Commission liberalized the duopoly rule with respect to radio.[140]

115. With respect to television, however, we must be cautious in our analysis of

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[137] See, e.g., First Report and Order in Docket No. 18110, supra at 311.

[138] *See* ¶25, supra.

[139] 7 FCC Rcd at 2774.

[140] Additionally, as noted above, there is an argument that consolidation in broadcasting can promote rather than retard program diversity.

outlet diversity, and the impact of mergers among TV stations on the local level on such diversity. All services are not equally available to the general population. For example, consumers can receive broadcast television for "free."[141] Access to cable (or, for that matter, to any of the other video services), requires the direct payment of a subscription fee (plus, in the case of some alternate video media, the purchase of equipment), which some consumers might not be able to afford or wish to pay for. Thus, we must take into account that the apparent level of outlet diversity may not reflect what is, in fact, available to, or obtainable by, many consumers.[142] If we decide to relax our local ownership regulations on the premise that if local television markets become more consolidated other media, including cable and newspapers, will provide sufficient diversity, how should we take account of the fact that some viewers are unable to subscribe or to acquire special equipment? How, if at all, should the portion of viewers that chooses not to subscribe affect our analysis of available programming outlets? Is an outlet of opinion less available simply because it is not popular or is more costly? We note that when analyzing local diversity in specific cases, we have often cited the number of area newspapers; their subscriber levels have not played a role in our analysis -- only whether they exist.[143] Accordingly, we seek further comment on the degree to which such fee-based sources and outlets for video programming provide true alternatives to over-the-air television for purposes of ensuring viewpoint diversity.

F. Tentative Proposals

116. The current rule prohibits common ownership of broadcast television stations with overlapping Grade B contours.[144] Because the delivery of video programming by broadcast television stations is local in nature, we are more concerned about the effects of relaxing the local ownership rule, than the national ownership rule, on our competitive and diversity concerns. As discussed below, however, we believe that the record already established is sufficient to justify proposing to relax the rule by decreasing its prohibited contour overlap from Grade B to Grade A. We also seek comment on other possible ways in which the rule could be modified.

117. In the NPRM, we asked whether we should modify the contour overlap rule,

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[141] Although, as discussed above at footnote 91, the consumer does pay, indirectly, some of the costs for "free" broadcast television.

[142] For example, one-third of households that are wired for cable elect not to subscribe. Cable Competition Report, supra at ¶97. Furthermore, the availability of home satellite dishes may be limited by zoning regulations and homeowner association rules. Id. at ¶76.

[143] See, e.g., Fox Television Stations, Inc., 8 FCC Rcd 5341, 5351 (1993), recon. denied, 8 FCC Rcd 8744 (1993).

[144] The Grade B encompasses approximately a 50 to 70 mile radius around the television station's transmitter; the Grade A encompasses approximately a 30 to 45 mile radius.

balancing the greater flexibility afforded broadcasters against the potential harm to our underlying competition and diversity concerns. We invited comment on whether the predicted Grade B contour should continue to determine prohibited overlap, or whether we should change it to the Grade A contour. This change would narrow the geographic area in which common ownership of television stations would trigger our rules to an area that more accurately reflects a station's core market. The vast majority of commenters agreed that a Grade A contour standard provides a substantially more realistic and accurate measure of a station's core market than the existing Grade B contour rule. The commenters also stated that the switch from a Grade B standard to a Grade A standard will increase broadcasters' long-term viability by enabling them to reap the benefits provided by "economies of scale" -- without any commensurate loss in program diversity. In fact, several commenters indicated that the savings allowed by streamlining management, marketing, and station administration will actually increase broadcasters' ability to provide program diversity, variety and quality. In light of the support for this concept in the record of this proceeding, we propose to modify this rule so that joint ownership will be precluded only where there is overlap of the Grade A contour. We seek further comment on this proposal in light of our competitive and diversity analyses of the television broadcasting industry. We also request comment on what the impact would be of moving from a Grade B to a Grade A contour rule on particular markets. Further, how many cases would occur in which relaxing the rule to a Grade A contour would allow an entity to own two stations within a single designated market area or within a single metropolitan statistical area?

118. As a separate matter from whichever contour test we ultimately decide to use, the issue arises as to whether, in at least some situations, we should allow a company to acquire stations with overlapping contours. We ask for comment on whether we should permit common ownership in local markets, such as UHF/UHF combinations or UHF/VHF combinations, or maintain the current prohibition against contour overlap and allow waivers either under a presumptive guideline or a case-by-case basis.

119. In the NPRM, we asked whether or not an entity should be permitted to own two UHF stations with overlapping contours. In making this proposal, we recognized the historical handicap of UHF stations relative to VHF stations in terms of signal coverage and operating expenses. We also sought comment on whether we should permit a UHF station to merge with a VHF station as a more effective way of preserving or improving the service of UHF stations.[145] We also inquired whether it would be appropriate to consider such consolidations only where a minimum number of separately owned television stations would remain after the proposed combination (e.g., a minimum of six independently owned stations). These proposals were specifically targeted to provide competitive enhancements to the weaker segments of the broadcast television industry. Commenters were very divided as to whether

[145] The NPRM noted that as the television broadcast industry makes a transition to ATV technology, this distinction may no longer be relevant and requested commenters to consider the possible impact of ATV on the proposed rule.

the economic benefits to licensees outweighed the potential harm to competition and diversity. Commenters are invited to submit further analyses of these proposals with reference to a Grade A contour definition of the relevant local geographic market for purposes of establishing local television ownership limits. However, commenters arguing that the economic benefits outweigh the potential harm to competition and diversity need to provide more specific evidence of the projected economic benefits as weighed against the potential harm to competition and diversity.

120. If we were to maintain the existing prohibition against common ownership of broadcast television stations with contour overlap but allow waivers, then we must determine whether to follow a case-by-case approach.[146] Parties may wish to address the factors we currently consider in our one-to-a-market waiver, which include the financial condition of the station to be purchased, the competitive and diversity characteristics of the market, and potential public interest benefits.[147]

121. Whether we relax the rule or adopt a waiver standard, we feel it necessary to consider the number of independent suppliers serving the market. In other words, in deciding upon whether to allow certain broadcast television station mergers, we seek to determine whether we should indicate how many independent suppliers must remain in a given region after the mergers and who should be considered alternative suppliers. In a number of our past ownership proceedings, we described and generally took into account the growth of new media that provide competitive and diversity enhancing alternatives to over-the-air television (or radio). However, with the exception of our one-to-a-market rule, when it came to the actual rule itself, we fashioned a rule that counted only television stations or only radio stations in the local or in the national market. Hence, we did not take explicit account of other alternative or competitive media outlets. In Sections III and IV above, we arrive at different conclusions about who are the relevant alternative suppliers, depending upon the market we were discussing (e.g., market for delivered home video programming, advertising market, and video program production market) and the kind of analysis we were concerned with (e.g., competitive analysis versus diversity analysis). This raises the issue of which market or analysis should control the determination of who are the independent suppliers that we count for purposes of setting local ownership limits. We solicit comment on this issue.

122. In determining the number of independent suppliers for either competitive or

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[146] Currently we consider waivers on a case-by-case basis and consider the degree of contour overlap , effect on service to unserved or underserved areas, and whether one of the stations is failing. See, e.g., Iowa State University, 9 FCC Rcd 481 (1993); Pegasus Broadcasting, 7 FCC Rcd 8625 (1992).

[147] See 4 FCC Rcd 6489 (1989) (one-to-a-market waiver); cf Satellite Television Stations, 6 FCC Rcd 4212 (1991), petitions for recon. pending; Second Further Notice of Proposed Rulemaking, 6 FCC Rcd 5010 (1991).

diversity analysis of a relaxation to the contour overlap rule, we must define the region in which we perform the count. One proposal is to treat the overlap area as the relevant region. In other words, we might possibly allow a company to own two broadcast television stations with contour overlap as long as there are a sufficient number of independent suppliers serving the same area (within their contour overlap). Another proposal would be to treat the relevant region as the DMA within which the two broadcast television stations operate.[148] This second alternative is motivated by the economic and diversity analysis which suggests that the DMA region definition may be more descriptive of a broadcast television station's potential market. Thus this proposal might allow joint ownership of two broadcast television stations with contour overlap when such joint ownership does not reduce the number of independent suppliers in their DMA below some critical level. We solicit comment on both these proposals.

123. Finally, should we decide to designate a minimum number of independent suppliers that should remain in a local market, we must address whether we should choose a number which allows everyone in the market currently to acquire another station or whether we should allow firms to be acquired on a first-come first-served basis until some minimum number of independent broadcast television stations remain. The first approach might be to permit joint ownership of any two television stations in large television markets, even where there is contour overlap. If we were to adopt such a rule, the number of competitors, or independent voices, in each of these local markets could be reduced by as much as one-half, if all those entities that were now permitted to merge, did. Our initial analysis of this rule proposal is that since only the the largest television markets have more than 15 commercial broadcast television stations, and most other markets do not have many other separate video outlets, competition as well as diversity could be seriously harmed if all licensees in these markets, including larger markets, were permitted to purchase a second television station. The second approach, allowing companies to acquire broadcast television stations with contour overlaps on a first-come-first-served basis until the number of remaining independent suppliers reaches some lower bound, raises the issue of how many independent suppliers are enough to ensure workable competition and sufficient diversity in those markets. One approach to answering this question would be to focus upon the DOJ/FTC merger guidelines in deciding upon the minimal number of independent suppliers we would allow.[149] However, we are concerned that, given our diversity requirements, a merger guideline based standard might be too low. The purpose of the merger guidelines is to define the point at which heightened antitrust scrutiny is required. Our purpose in encouraging diversity in broadcast

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[148] We note that in revising the radio ownership rules, we relaxed the contour overlap standard for all radio stations, and also adopted a market-based standard to permit a limited degree of joint ownership in certain markets in spite of the prohibited contour overlap.

[149] Roughly these DOJ guidelines would suggest a lower bound of 10 independent suppliers of home delivered video programming before traditional antitrust concerns are raised.

services is not to merely meet a minimum acceptable benchmark, but rather, to encourage a wide array of voices and viewpoints. Consequently, we seek guidance on which threshold number, if any, of remaining independent suppliers would satisfy both our competition and diversity concerns. Further, we ask for comment on whether simply counting outlets is preferable to examining audience share for addressing the impact of an outlet on our competitive and diversity concerns. Finally, we seek guidance on which of the above approaches is the preferred approach with respect to these concerns.

VII. THE RADIO-TELEVISION CROSS-OWNERSHIP RULE

124. The radio-television cross-ownership rule, or the one-to-a-market rule, basically provides that a company cannot own both a radio station and a television station located in a given "local" market.[150] This rule was adopted to limit any potential market power in the media market, and to ensure a sufficient diversity of broadcast outlets. The Commission amended this rule in 1989 to permit, on a waiver basis, radio-television mergers as long as the combination occurred in one of the top 25 television markets and 30 separately owned broadcast licensees remained after the combination, or if the waiver request involved a "failed" station, or if the waiver request satisfactorily addressed five criteria which relate to public interest concerns.[151] Whether this limit is still needed to promote these ends will be considered in the following discussion.

A. Effects on the Market for Delivered Programming

125. In Section III A above, we tentatively concluded that delivered video programming and delivered audio programming were sufficiently distinct products so as to represent different product markets for competitive analysis purposes. Thus, since television and radio stations do not operate in the same relevant markets for delivered programming, allowing cross-ownership between them in a local market would not appear to harm competition in either. Commenters are asked to provide information on the nature and extent of harm, if any, from relaxing this rule on these markets.

B. Effects on the Market for Advertising

126. The main potential economic cost of permitting the owner of a broadcast TV station to own a broadcast radio station in a local market, or vice versa, appears to be that it

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[150] All licensees are permitted to own one AM radio station and one FM radio station in the same market (i.e., an AM-FM combination).

[151] These criteria or factors include the types of facilities involved, the number of stations already owned by the applicant, the financial situation of the station(s), and the nature of the market in light of our diversity and competition concerns.

might give the company the market power to raise local radio and/or television advertising rates. The above discussion does not speak to this point because people may listen to radio and watch television at different times, but advertisers might view either means as an acceptable substitute for getting their message to the same people. On the other hand, some advertising messages may be more effective on television; others on radio. However, as our earlier discussion indicated, we do not have sufficient evidence on this issue to address the effects of relaxing the one-to-a-market rule on the local advertising market. Assuming for the purposes of soliciting comments, that they are economically relevant substitutes, then the issue arises as to how many independent suppliers of local advertising are necessary to ensure that these markets are workably competitive. We invite comment and evidence on both these issues.

C. Effects on the Video and Audio Program Production Markets

127. In Section III C above, we tentatively concluded that video programs are sufficiently distinct products that the market for video program production should be considered a separate product market. By this logic, the markets for video program production and audio program production are arguably distinct markets. Consequently market power in the video program production market should not translate into market power in the audio program production market, unless the company already has such market power. However, these program production markets are national markets and presumably the national ownership limits for either broadcasting station type should prevent a company from acquiring such market power. Thus we see no reason why relaxing the one-to-a-market rule should harm competition in either of these supply markets, but seek comment on this tentative conclusion.

D. Other Economic Effects

128. The benefits of permitting the owner of a broadcast TV station to own a broadcast radio station in the same local market, or vice versa, are similar to the benefits of permitting joint ownership of two local television stations and were documented in our recent proceeding to adopt a waiver standard to approve such radio-TV combinations.[152] The company can reduce its video and audio programming costs through a reduction in personnel and overhead expenses. Further, the company could use one advertising sales force instead of two for the two stations. This reduction in expense could make the joint enterprise more economically viable than the separate operations were before the combination took place. It would be important for commenters to provide evidence on the size of such efficiency gains so the Commission could weigh them against any potential costs of relaxing the one-to-a-market rule.

E. Effects on Diversity

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[152] 4 FCC Rcd 6489 (1989).

129. The radio-television ("one to a market") rule is intended to foster outlet and viewpoint diversity on the local level.[153] That is, it is designed to assure that no individual or entity can have control over outlets in different media in the same location unless the area is so rich with competitive media outlets that a radio-television combination will not undermine diversity or where the combination is necessary to preserve a failing station, the failure of which would reduce diversity in the market in any case. The rule appears to be achieving the diversity goals for which it was adopted, but may not be necessary in its current form to ensure competitive and diverse radio and television markets. We have previously noted that even smaller markets have a considerable number of television, radio and other programming sources available. In markets ranked between 126 and 150 on the basis of their ADIs, we noted, there are on the average six broadcast television signals and 18 radio signals.[154] Additionally, most such markets have access to cable.[155] Nevertheless, as we noted above, diversity has the most impact in the local context and we must be cautious in taking any action that could serve to reduce that diversity, particularly in smaller markets.

F. Tentative Proposals

130. The NPRM in this proceeding sought comment on a variety of proposed relaxations to the one-to-a-market rule, including: (1) elimination of the rule -- using local limits of each service to prevent undue concentration; (2) allowing common ownership of one AM, one FM and one TV station per market; (3) allowing TV-AM combinations only; and, (4) codifying current waiver criteria and applying them to all markets, and not just the top 25 markets, where 30 independently owned voices remain. Commenters were generally in favor of elimination or relaxation of the current rule, arguing that the economies from joint operations would allow more stations to remain on the air and would also permit licensees to provide better service to the public.

131. In light of our earlier competitive and diversity analyses, we tentatively conclude that there are two alternative approaches towards modifying the one-to-a-market rule. If we conclude, after review of the comments and our own analysis, that radio stations and television stations do not compete in the same local advertising, program delivery, or diversity markets, we propose to eliminate this rule entirely and rely on our local ownership rules to ensure competition and diversity at the local level, i.e., proposal number 1 above. This would mean that we would allow entities to own one AM, one FM, and one TV station in even the smallest markets. In large markets, one entity would be allowed to own up to two AMs, two

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[153] Of course, what is considered "local" is subject to comment (and amendment) in this proceeding. Nevertheless, the rule depends on signal contour overlap so, clearly, the geographic market for diversity is a local market.

[154] NPRM, supra at 4116.

[155] As previously indicated, over 96 percent of all television households in the United States are passed by a cable system. Cable Competition Report, supra at para. 18.

FMs, and one TV station.

132. If, on the other hand, we conclude that radio and television do compete in some or all of the same local markets, then we must address how to modify the one-to-a-market rule, if at all. In this case, we propose a modified form of proposal number 4 above. Specifically, we propose to allow radio-television combinations (AM-TV, FM-TV, or AM-FM-TV) in those markets that have a sufficient number of remaining alternative suppliers/outlets as to ensure sufficient diversity and workable competition. In this regard, we seek comment on whether "30 separately owned, operated and controlled broadcast licensees"[156] continues to represent the appropriate minimum requirement, or whether our diversity and competition concerns can be satisfied if a lesser number of licensees remain, such as 20. This lesser number may be justified by the increased role of cable and the future role of DBS and video dialtone offerings in providing areas with alternatives to broadcast media. Under this proposal such combinations would be automatically allowable by rule; it would not be necessary for applicants to seek a waiver. Further, we seek comment on whether this count should be for independent suppliers/outlets within a DMA or some other geographic market delineation. Finally, we note that if we were to adopt this modified version of proposal 4 above, we also propose to continue accepting waivers for "failed" broadcast stations as currently provided for in note 7 of §73.3555 of the Commission's Rules, and to continue evaluating other waiver requests on the basis of the five considerations set forth in the Second Report and Order[157] and the Memorandum and Order[158] in MM Docket No. 87-7.

VIII. LOCAL MARKETING AGREEMENTS

A. Description

133. We now turn our attention to the issue of Local Marketing Agreements (LMAs). As stated above, an LMA is a type of joint venture that generally involves the sale by a licensee of discrete blocks of time to a broker who then supplies the programming to fill that time and sells the commercial spot announcements to support it.[159] Such agreements enable

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[156] 47 CFR §73.3555, note 7.

[157] 4 FCC Rcd 1741 (1989).

[158] 4 FCC Rcd 6489 (1989).

[159] Revision of Radio Rules and Policies, 7 FCC Rcd 2755, 2784 (1992). Network affiliation agreements are a variant of time brokerage whereby the local affiliate sells time to the network in exchange for desirable programming, station compensation, and the opportunity to place local commercials within popular national programs. Id. at 2784-85, n.113 (1992). Despite the fact that a network affiliate may broadcast a significant portion of

separately owned stations to function cooperatively via joint advertising, shared technical facilities, and joint programming arrangements. In the radio ownership proceeding, we adopted guidelines primarily applicable to the AM and FM services for LMAs. These guidelines were affirmed and clarified in both the First Reconsideration Order, 7 FCC Rcd 6387 at 6400-6402 (1992), and the Second Reconsideration Order, 9 FCC Rcd 7183 (1994). Specifically, we required that a licensee's time brokerage of any other radio station in the same market for more than fifteen percent of the brokered station's weekly broadcast hours would result in counting the brokered station toward the brokering licensee's national and local ownership limits. See 47 C.F.R. Section 73.3555(a)(2)(i). We also required that most radio LMAs be kept in the public inspection files of the stations involved and also be filed with the Commission. See 47 C.F.R. Section 73.3613(d). We also decided that TV station LMAs should be kept at the station and be made available for inspection upon request by the Commission. See 47 C.F.R. Section 73.3613(e).[160]

134. In the TV NPRM, we sought comment on the prevalence of TV LMAs, whether they presented the same types of competitive and diversity concerns that we found in the radio context, and whether they should be subject to some limitations. Few commenters addressed LMAs, and none provided specific information concerning their prevalence. The comments we did receive basically expressed two divergent general views. Some commenters felt that TV LMAs should remain unregulated absent evidence of abuse, irrespective of whether new TV multiple ownership rules are adopted.[161] Other commenters felt that if the Commission did adopt rules governing TV LMAs, such rules should be no more restrictive than those governing radio LMAs.[162]

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network programming, the affiliate, unless actually owned by the network, is not attributed to the network. See generally, 47 C.F.R. § 73.3555, Note 2 (network affiliation agreement is not included in the list of attributable interests); 47 C.F.R. § 73.658 (distinction between network affiliation and network ownership implicit in discussion of guidelines for network affiliation agreements).

[160] In the First Radio Reconsideration, supra, we adopted a requirement that all LMAs be kept at the stations involved and be made available for inspection upon request by the FCC. Although the Notice of Proposed Rulemaking in that proceeding did not specifically include TV LMAs, the notice given was sufficiently broad to support the rule as adopted. To whatever extent, if any, that commenters disagree with this conclusion, we will give further consideration to this requirement in the instant proceeding.

[161] See Comments of KFVE p.10; Comments of Associated Broadcasters, Inc. and Galloway Media, p.17.

[162] See Comments of INTV, p. 27; Comments of Fisher Broadcasting, p. 6; Comments of National Broadcasting Company, Inc., p. 42.

135. From our experience with radio LMAs, it appears that such agreements, subject to some general Commission guidelines, can provide competitive and diversity benefits to both the brokering parties and to the public. To maximize such benefits in the TV context, while minimizing potential adverse consequences, we believe that guidelines similar to those governing radio LMAs may be necessary with regard to TV LMAs as well. Accordingly, since the comments regarding LMAs from the TV NPRM require elaboration, we now seek such further comments to enable us to adopt appropriate guidelines for TV LMAs.

136. Although we are aware that LMAs are currently used by some TV stations, we have already noted that the previous comments did not address the prevalence of such agreements in the TV industry. Accordingly, as an initial matter, we seek comment providing specific quantitative data about this issue indicating the number of such agreements currently in existence. If such comment is not received, it may be necessary for the Commission to conduct a survey to obtain this quantitative data.

137. Experience has shown us that in the radio context, LMAs are often used as precursors to the sale of radio stations pending the acquisition of financing and Commission approval of the assignment application. Such agreements may also enable radio stations to enjoy the benefits of economies of scale by combining various operations and facilities. Although it seems probable that LMAs serve the same general purposes for TV stations, we seek comment on the following issues. Do TV LMAs serve the same purposes as radio LMAs or are there significant differences between them? What benefits accrue to the parties involved in TV LMAs? What benefits accrue to the public from TV LMAs?

B. Analysis and Tentative Proposals

138. To ensure that stations using LMAs comply with the Commission's new national and local radio ownership rules, we adopted certain attribution principles for radio LMAs. Specifically, we determined that time brokerage of another radio station in the same market for more than fifteen percent of the brokered station's weekly broadcast hours, would result in counting the brokered station toward the brokering licensee's national and local multiple ownership limits.[163] Similarly, to ensure that TV stations using LMAs comply with the TV multiple ownership rules, regardless of whether such rules are modified, we believe that some guidelines may be necessary. We tentatively propose to treat LMAs involving television stations in the same basic manner as we did for radio stations. That is, time brokerage of another television station in the same market for more than fifteen percent of the brokered station's weekly broadcast hours would result in counting the brokered station toward the brokering licensee's national and local ownership limits. If the local TV multiple ownership rules are not relaxed, such an attribution provision would preclude TV LMAs in any market where the time broker owns or has an attributable interest in another TV station. Additionally, TV LMAs would be required to be filed with the Commission in addition to the

[163] See 47 C.F.R. § 73.3555(a)(2)(i).

existing requirement that they be kept at the stations involved in an LMA. Furthermore, our TV LMA guidelines would allow for "grandfathering" TV LMAs entered into prior to the adoption date of this Notice, subject to renewability and transferability guidelines similar to those governing radio LMAs. [164]

139. To test the appropriateness of this proposal, we seek comment on the following issues. Are there any compelling reasons why the Commission should not apply the existing radio LMA guidelines, including the filing requirements, the limitation on program duplication, and the ownership attribution provisions, to TV LMAs? If the radio ownership attribution rule applies to TV LMAs, should the Commission use the fifteen percent benchmark that it used in the radio context, or is some other percentage more appropriate? What effects, if any, should LMAs have on the renewal expectancy of TV stations? What effects, if any, would these proposed attribution guidelines have on ownership of TV stations by minorities and women, and how should the Commission deal with such effects? Comments relating to the effects of LMAs on ownership of broadcast stations by minorities and women, should be directed to our concurrent Notice of Proposed Rulemaking dealing specifically with the issues of minority and female ownership in MM Docket No. 94-150.

140. To avoid any unnecessary disruption to existing contractual relationships, we also seek comment on guidelines concerning the termination, transferability and renewal of TV LMAs. Should the contract rights associated with existing TV LMAs be transferable when the brokering station is sold? If so, what restrictions, if any, should apply? Should TV LMAs entered into before the adoption date of this Notice be subject to the same "grandfathering" and renewability guidelines that govern radio LMAs as set forth in the Second Radio Reconsideration, supra, irrespective of whether the local TV multiple ownership rules are modified? Specifically, should existing LMAs be "grandfathered" for the remainder of the initial term of the LMA and then be subject to the governing local TV multiple ownership rules?

IX. SUMMARY

141. By this Further Notice of Proposed Rule Making, we hope to receive comments on the myriad of issues pertinent to our proposed changes in the Commission's television ownership rules. These comments should attempt to frame their discussion and analysis in a manner consistent with our proposed analytical frameworks for addressing our historic competition and diversity concerns. However, if there are issues pertinent to these concerns, which we have not specifically addressed in the above discussion, then we would expect commenters to bring those issues to our attention. Further, for these newly identified issues, commenters are asked to provide sufficient data and/or analysis so we can determine the importance of the newly raised issue.

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[164] See Second Radio Reconsideration Order, supra.

X. ADMINISTRATIVE MATTERS

142. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, 47 C.F.R. Sections 1.415 and 1.419, interested parties may file comments on or before (April 17, 1995), and reply comments on or before (May 17, 1995). To file formally in this proceeding, you must file an original plus five copies of all comments, reply comments, and supporting comments. If you want each Commissioner to receive a personal copy of your comments, you must file an original plus nine copies. You should send comments and reply comments to Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center (Room 239), 1919 M Street, N.W., Washington, D.C. 20554.

143. This is a non-restricted notice and comment rulemaking proceeding. Ex parte presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in the Commission Rules. See generally 47 C.F.R. Sections 1.1202, 1.1203, and 1.1206(a).

144. Additional Information: For additional information on this proceeding, contact Roger Holberg (202-418-2134), or Robert Kieschnick (202-418-2183), Mass Media Bureau.

XI. INITIAL REGULATORY FLEXIBILITY ACT STATEMENT

145. The Initial Regulatory Flexibility Act Statement found in paragraphs 45 through 52 (7 FCC Rcd at 4120) in the Notice of Proposed Rule Making in this proceeding remains unchanged.

146. As required by Section 603 of the Regulatory Flexibility Act, the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) of the expected impact on small entities of the proposals suggested in this document. The IRFA is set forth in the Notice of Proposed Rule Making in this proceeding as set forth above. Written public comments are requested on the IRFA. These comments must be filed in accordance with the same filing deadlines as comments on the rest of this Further Notice, but they must have a separate and distinct heading designating them as responses to the Initial Regulatory Flexibility Analysis. The Secretary shall send a copy of this Further Notice of Proposed Rule Making, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel forAdvocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act. Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. Section 601 et seq (1981).

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

APPENDIX A: LIST OF COMMENTING PARTIES

Comments

1. Abry Communications
2. Act III Broadcasting, Inc.
3. Associated Broadcasters, Inc. and Galloway Media, Inc.
4. Association of Independent Television Stations, Inc.
5. Barnstable Broadcasting, Inc.
6. Buck Owens Production Company, Inc.
7. Capital Cities/ABC, Inc.
8. Capitol Broadcasting Company, Inc.
9. CBS Inc.
10. Clear Channel Communications
11. Commonwealth Communications Services, Inc.
12. Fisher Broadcasting Inc.
13. Fox Inc.
14. Home Shopping Network, Inc.
15. Jet Broadcasting Co., Inc.
16. KFVE Joint Venture
17. LIN Broadcasting Corporation, Midwest Television, Inc., Paducah Newspapers, Inc., Post-Newsweek Stations, Inc., Providence Journal Company, and The Spartan Radiocasting Company
18. Malrite Communications Group, Inc.
19. Marion TV, Inc.
20. McKinnon Broadcasting Company
21. Morgan Murphy Stations
22. National Association of Broadcasters
23. National Broadcasting Company, Inc.
24. National Telecommunications and Information Administration
25. Network Affiliated Stations Alliance
26. Office of Communication of the United Church of Christ
27. Press Broadcasting Company, Inc.
28. Sinclair Broadcast Group, Inc.
29. Trinity Broadcasting Network
30. United States Catholic Conference
31. Vetter Communications Company, Inc.
32. Westinghouse Broadcasting Company, Inc.
33. WKRG-TV, Inc. and WEVV, Inc.
34. WNAL-TV, Inc.

Reply Comments

1. ABC Television Affiliates Association
2. American Federation of Television and Radio Artists
3. Associated Broadcasters, Inc. and Galloway Media, Inc.
4. Association of Independent Television Stations, Inc.
5. Blackburn & Company, Inc.
6. Federal Trade Commission, Staff of the Bureau of Economics
7. Jet Broadcasting Co., Inc.
8. KMTR, Inc.
9. Morgan Murphy Stations
10. National Association of Black Owned Broadcasters
11. National Association of Broadcasters
12. National Broadcasting Company, Inc.
13. Office of Communications of the United Church of Christ
14. Paramount Stations Group, Inc.
15. Telecommunications Research and Action Center/Washington Area Citizens Coalition Interested in Viewers' Constitutional Rights
16. WJAC, Inc.
17. WKRG, Inc. and WEVV, Inc.

APPENDIX B: COMMENT SUMMARY

National Broadcast Television Ownership Rules

Current regulation limits the number and audience reach of television stations in which an entity may hold an attributable interest to 12 stations and 25% of total television households on a national basis. The NPRM proposed several alternatives including:

-increasing the numerical limit to 20 or 24 and the reach limit to 35%
-increasing the numerical limit to 18 and the reach limit to 30%
-increasing the numerical limit only and retaining the 25% reach limit.

Public interest groups commenting in this proceeding[165] and one broadcaster, Fisher Broadcasting[166], favored retention of the existing limits. They argue that increasing the ownership limits will harm the Commission's core goal of promoting diversity of programming. Contrary to the Commission's assertion that the economies of scale made possible by increased ownership limits could permit the production of new, diverse, and locally produced programming[167], they argue that such savings will be used to reduce debt or purchase more expensive syndicated programming.

All other comments filed favor elimination or relaxation of the rule. NTIA and CBS, among others[168], urge total elimination of the rule.[169] Fox believes that the Commission should relax the national ownership limitations to permit entities to hold attributable interests in television stations reaching less than 50% of the nation's households. If a numerical limitation is retained, Fox continues, it should be increased to 25 stations and the Commission should retain its current rule attributing UHF stations with 50% of the households in their

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[165] Comments of Office of Communication of the United Church of Christ ("UCC"), p. 10 and United States Catholic Conference ("USCC"), p. 1.

[166] Comments of Fisher Broadcasting Inc. ("Fisher Broadcasting"), p. 2.

[167] See, Notice of Proposed Rule Making in MM Docket No. 91-221, 7 FCC Rcd 4111, para. 11 (1992).

[168] Comments of Associated Broadcasters, Inc., and Galloway Media, Inc., p. 2, and of Home Shopping Network, Inc., p. 2.

[169] Comments of National Telecommunications and Information Administration ("NTIA"), p. 1, and comments of CBS, Inc. ("CBS"), p. 5. Alternatively, NTIA supports phase-out of the rule and CBS would raise the limit to 24 stations with a combined audience reach of not more than 35 percent.

ADI market.[170] NBC argues for a more moderate increase, such as raising the numerical limit to 18 stations and the audience reach limit to 35%.[171] ABC[172], NAB[173] and INTV[174] also favor a numerical limit of 18 stations, but argue for a 30% audience reach limit. INTV argues, in addition, that we should review the national TV ownership limits again every three years, applying a presumption that the limits should be relaxed.

The proponents of elimination or relaxation of the rule argue that the proliferation of television stations and competing video sources has obviated or undermined the diversity rationale that has supported regulation in this area. Moreover, they contend that increased group ownership would foster competition by permitting broadcasters to achieve economies of scale that would enable then to better compete with cable, which enjoys a dual revenue stream from subscribers as well as advertisers, not available to over-the-air television.[175]

Local Broadcast Television Ownership Rules - Duopoly

A vast majority of commenters agreed that relaxation of current local duopoly rules will promote broadcasters' overall competitiveness in the video marketplace.[176] Nearly all proponents think that a Grade A contour standard provides a substantially more realistic and accurate measure of a station's core market than the existing Grade B contour rule.[177]

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[170] Comments of Fox, Inc.("Fox"), p. 1, and of Trinity Broadcast Network ("Trinity"), pp. 4-5. Trinity also supports eliminating numerical limit but retaining a 25% audience reach limit.

[171] Comments of National Broadcasting Company, Inc. ("NBC"), p. 2.

[172] Comments of Network Affiliated Stations Alliance ("NASA"), p. 18.

[173] Comments of National Association of Broadcasters ("NAB"), p. 3.

[174] Comments of Association of Independent Television Stations, Inc. ("INTV"), p. 2.

[175] Comments of NTIA and CBS.

[176] Act III Broadcasting, Inc., indicates that if the Commission retains the current Grade B local duopoly restriction, that it should establish a policy for de minimus waivers, or other such process, so that buyers can bypass the rule when no substantial concerns of diversity loss or undue concentration are raised.

[177] Commenters did not hesitate to categorize the current duopoly rule as "anachronistic". Fisher Broadcasting states that the Grade B standard no longer comports with reality, and more specifically the development of "strip cities" over the last 20 years. Fisher believes that the current rule causes huge metropolitan areas to receive a lower quality of service than would otherwise be the case.

Moreover, most proponents believe that the switch from a Grade B standard to a Grade A standard will increase broadcasters' long-term viability by enabling them to reap the benefits provided by "economies of scale" -- without out any commensurate loss in program "diversity."[178] In fact, several commenters indicate that the savings allowed by streamlining management, marketing and station administration will actually increase broadcasters' ability to provide program diversity, variety and quality. While NAB and Fisher Broadcasting oppose any further relaxation of the rule,[179] some commenters suggest that additional relaxation should be considered in two to three years.

Several commentators, particularly broadcasters, urge the Commission to go further. Generally, CBS, INTV, Westinghouse and others support relaxation of the rule, particularly with respect to UHF-UHF combinations in any market. Westinghouse and others would permit VHF-UHF combinations in the same market, although conditions they would place on these arrangements vary. Some commenters would support only VHF-UHF combinations within the Grade A contour while others would allow any television duopoly combination as long as a certain number of voices remained in the market. Still others would only allow the combination if both stations were non-network affiliates while others would permit it if the UHF station was an independent.

A few commenters would drop contour-based duopoly restrictions altogether. Proponents of this view, such as Fox and NTIA, believe that the Commission should adopt an actual audience share approach by utilizing Arbitron ADI data because it is the most accurate indicator of a broadcaster's market power.[180] While Fox proposes that a minimum number of independents remain in the market after acquisition, along with ADI data to prevent undue local concentration, NTIA proposes a system based solely on audience reach, regardless of the

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[178] Commenters note that the greatest cost savings stem from ownership of co-located stations because most costs are local.

[179] NAB and Fisher are concerned that further relaxation of duopoly restrictions into the Grade A contour area would have a "destabalizing effect"-- causing broadcast owners to attempt to purchase another station while also trying to finance the technical upgrades necessary for ATV. Thus, they argue that there are tangible limits to the benefits of economies of scale, and that further relaxation beyond going from a Grade B to Grade A overlap standard would undermine the public interest by allowing dominant broadcasters to benefit from additional economies of scale at the expense or demise of weaker broadcasters, who are unable to further streamline station administration, etc. See Comment of Fisher Broadcasting, p. 4.

[180] Fox, however, does not address the regulatory and administrative difficulties of dealing with rating fluctuations.

number of remaining independently controlled community voices.[181] A few commenters suggest the adoption of an *ad hoc* regulatory scheme, in order to take into consideration the uniqueness of a particular market.[182] Still others propose a two-to-a-market rule, so long as there remain four to six independently owned stations in the local market. Arby Communications proposes perhaps the most radical approach, suggesting that local duopoly restrictions should be dropped altogether--indicating that diversity and undue concentration concerns are best kept in check at the national level.[183]

Some commenters, such as Sinclair Broadcast Group, Inc., feel that duopoly restrictions should only be eliminated for UHF licensees, (keeping the rule otherwise in its current form) thereby leveling the playing field between UHF stations and dominant VHFs. Trinity Broadcasting Network, owning 11 independent UHF stations, however, urges the Commission to adopt Grade A contour restriction for all stations, except unaffiliated UHF broadcasters, who would be free to come under common ownership, regardless of contour overlap.[184] Vetter Communications Company, Inc., suggests that the duopoly rules be relaxed to two-to-a-market combinations between VHF-UHF or UHF-UHF combinations only, while

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[181] Like Fox, NTIA urges eliminating either a Grade B or Grade A signal contour standard. It flatly states that the Commission's duopoly proposal is "inadequate", because it would still preserve many of the problems of the current rule. Instead, it suggests the adoption of an audience share cap whereby the combined audience share of commonly-owned stations could not exceed an established threshold. See comments of NTIA, pp. 21-22. Divestiture of a station would not be required of a group owner whose stations, subsequent to acquisition, exceeded the audience share cap because of internal growth. This would reduce the administrative burden that would otherwise attend such a system.

[182] Comments of KFVE Joint Venture ("KFVE"), pp. 3-4, and 6. KFVE, licensee of an independent VHF television station, also wants the Commission to drop distinctions between UHF and VHF, and not adopt any rule that would distinguish between affiliated and non-affiliated stations, stating that success or failure of stations has more to do with market size and the number of over-the-air competitors. Id. at 7. It would have the Commission review every market independently to determine whether common ownership of television stations with Grade A overlap would be permitted. See also, Comment of Marion TV, Inc., (UHF, Indianapolis, Indiana), pp. 3-4. Marion would have us adopt a presumption favoring duopoly situations with Grade A contour overlap present as long as certain, specific factors are met.

[183] Abry estimates that the typical savings available to co-owned stations with overlapping Grade B contours is only about 6%, on average, while the savings for co-owned stations within Grade A overlap would provide as much as 26% annual savings. Therefore, they argue, going from a Grade B restriction to a Grade A restriction is not enough.

[184] Comments of Trinity Broadcasting Network, pp. 7-8.

also replacing the Grade B standard with a Grade A standard.[185] WNAL-TV, Inc., (UHF, Gadsden, Alabama) which approves a relaxation of current duopoly rules, wants the Commission to consider "additional television services" like LPTV, DBS, and local translators in ascertaining the number of community voices for market concentration determination, and to create a rebuttable presumption that UHF-UHF acquisitions in same market will not undermine diversity or foster undue market control.[186] Along the same lines, Home Shopping Network would eliminate duopoly altogether for "unaffiliated" UHF's, as defined by 47 C.F.R. s. 73.662(i), citing UHF's historical handicaps.

In general, public interest groups (e.g., The United Church of Christ (UCC), United States Catholic Conference (USCC), Telecommunications Research and Action Center (TRAC)) and a few broadcasters (e.g., Press Broadcasting Company, and Malrite Communications Group, Inc.) oppose relaxing local duopoly rules. They believe that the "economies of scale" benefits provided to already financially strong stations will not only cause loss of diversity due to common control (via acquisition), but that those stations that cannot secure economic partners will ultimately be forced to shut-down operations. Opponents to duopoly relaxation insist that stations who do not merge will be "priced out" of the quality programming market, and will increasingly rely on the broadcast of "infomercials" for profit, rather than programming in the public interest. Thus, they continue, relaxation of the current rules will undermine all the goals that the Commission was created to promote; competition, diversity, localism, and public affairs programming. Moreover, opponents are in general agreement that the "economies of scale" justification for duopoly is unconvincing. According to those commenters, relaxation will financially burden many stations because the costs associated with acquiring and maintaining co-owned stations will not be commensurate with the only minimal or non-existent savings that will occur. These commenters assert that the existence of commonly controlled stations will lead to a sharp increase in the demand for, and costs of syndicated programming -- placing it out of the reach of individually owned stations, and even taxing the cash flow of the combinations. As a result, UCC argues that all broadcasters will be further weakened, allowing other video service providers such as DBS, cable, and other competitive video outlets to threaten the prolonged viability of "free" over-the-air television.

Local Broadcast Television Ownership Rules - "One to a Market"

The NPRM proposed alternatives to the current restrictions on common ownership of radio-television combinations in the same market, i.e., "one-to-a-market" rule.[187] Although the Commission currently grants presumptive waivers in the top-25 markets, if 30 independent voices will remain after the merger and normally issues waivers when certain specified factors

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[185] Comments of Vetter Communications Company, Inc., pp. 8-12.

[186] Comment of WNAL-TV, Inc., pp. 3-5.

[187] 47 C.F.R. § 73.3555(b).

are present,[188] the Commission offered four alternative proposals[189] for commenters to consider. A majority of commenters who discussed this rule, including NTIA, CBS, INTV, and Westinghouse, favored its complete elimination, based on an "economies of scale" rationale. Commenters such as Associated Broadcasters, Inc., and Galloway Media, Inc., argue that elimination is justified as it would allow marginal stations to remain on the air, and would likely spur the activation of unused channels, or permit upgrade of facilities.[190] Clear Channel Communications, Inc., argues that 12 "independent operators" remaining in the market would be sufficient to prevent undue concentration, so long as the definition of "operators" include cable, commercial and non-commercial radio and TV broadcasters. Barnstable Broadcasting, Inc., licensee of nine stations (three FM's, two FM-FM's, and one AM-FM), was the only commenter that specifically opposes repeal of the current rule, citing the economic advantage allowed to TV broadcasters, adversely affecting radio-only operations.

As an alternative to repeal, INTV suggests allowing common ownership of at least one station per service (e.g., an AM, an FM and a single TV), with the potential ownership of additional stations up to the maximum number permitted for each particular service. Similarly, NAB urges the Commission to allow cross-ownership up to the limits for each service, so long as 15 independently-owned total voices remain in the local market.[191] ABC concurs, but suggests that 30 such voices should remain. Fisher Broadcasting, Inc., who opposes changes in the national ownership rules and local duopoly, supports "liberalizing" cross-ownership, particularly for the smaller markets. Fisher points out, however, that the Commission's proposal of 30 remaining independently controlled voices would not direct "help" where it is needed, i.e., the smaller markets, where stations would be unable to avail themselves of the rule. JET Broadcasting Co. ("JET"), owner of a grandfathered radio-TV combination, favors the elimination of the one-to-a-market rule and states that the quality of public affairs programming on its FM station is vastly improved by utilizing its TV news facilities. Moreover, JET argues that the inherent separation of the two different media prevents the build-up of viewpoint concentration for TV-radio combinations. Unlike Fisher, however, JET asserts that markets of all sizes would benefit from relaxation. Buck Owens

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[188] See, 1989 Multiple Ownership Second Report, 4 FCC Rcd at 1754, which adopted an expanded waiver policy.

[189] The NPRM's proposals included: (1) Elimination of Rule--using local limits of each service to prevent undue concentration; (2) Allowing common ownership of one AM, one FM and one TV station per market; (3) Allowing TV-AM combinations only; (4) Codifying current waiver criteria and applying them to all markets where 30 independently owned voices remain. See, Notice of Proposed Rulemaking, MM Docket No. 91-221, 7 FCC Rcd 4111 (1992).

[190] Comments of Associated Broadcasters, Inc., and Galloway Media, Inc., pp. 7-8.

[191] NAB, however, is unclear how this proposal should be implemented if local duopoly rules are significantly relaxed.

Production Company, working under a "failed station" waiver in Bakersfield, CA, urges the Commission to adopt an AM-FM-TV rule, in order to prevent a penalty of divestiture if "rescues" are successful.

Local Marketing Agreements

Current FCC policy does not restrict television local marketing agreements ("LMAs"); the licensee is, however, required to remain in control of the station at all times. In the radio context, the Commission recently restricted unattributable time brokerage to 15% of the brokered station's weekly broadcast hours; agreements exceeding that will result in ownership attribution to the broker. In the NPRM, the Commission questioned the extent to which LMAs were pervasive in television, whether they present the same competitive and diversity concerns in television as in the radio industry, and whether restrictions on LMAs should be imposed if the television local ownership rules are substantially relaxed.

Few commenters addressed LMAs, and none provided specific information as to their prevalence in the industry. LIN Broadcasting Corp., *et al.*, comments that LMAs are beneficial, but argues that unless duopoly restrictions are relaxed, imposition of the radio model, in which LMAs may be considered an "attributable ownership interest", would preclude such arrangements between television stations in the same area--undermining the potential reduction in local costs. Such a result, they say, is inconsistent with previous policy articulations by the Commission, which has characterized such agreements as beneficial mechanisms that "enable stations to pool resources and reduce operating expenses without necessarily threatening competition or diversity".[192] Associated Broadcasters, Inc. and Galloway Media, Inc. believe that the Commission should not limit LMAs. Rather, they say, the Commission should encourage separately owned television stations to enter LMAs, time brokerage, program affiliation, and simulcast agreements, and other cooperative arrangements, so long as they are consistent with antitrust laws.[193]

INTV suggests that if the Commission substantially relaxes the local television ownership rules, it should govern time brokerage and local marketing agreements by the same standards as attributable ownership interests.[194] Fisher Broadcasting believes that the Commission should restrict television LMAs with limits identical to the radio limits (i.e., brokering more than 15% of a station's broadcast time should result in the station's treatment

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[192] Joint comments of LIN Broadcasting Corp., Midwest Television, Inc., Paducah Newspapers, Inc., Post-Newsweek Stations, Inc., Providence Journal Co., and Spartan Radiocasting Co., pp. 13-14.

[193] Comments of Associated Broadcasters, Inc., and Galloway Media, Inc., p. 17.

[194] Comments of INTV, p. 27.

as an attributable ownership interest for purposes of the multiple ownership rules).[195] In addition, NBC agrees that the Commission's rules regarding television LMAs should be no more restrictive than those regarding radio, because common utilization of newsgathering and production facilities may yield substantial cost savings and thus benefits viewers.[196] In fact, NBC argues that such arrangements may increase diversity by allowing both experimental programming and programming targeted to specific groups. KFVE contends that LMAs should remain unregulated absent evidence of abuse, whether or not the duopoly rule is liberalized and without regard to the adoption of new television multiple ownership rules.[197] The Office of Communication of the United Church of Christ believes that the Commission should adopt safeguards to prevent *de facto* transfers of control by requiring brokered stations to develop issues/program lists based on community ascertainment.[198]

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[195] Comments of Fisher Broadcasting, p. 6.

[196] Comments of National Broadcasting Company, Inc., p. 42.

[197] Comments of KFVE, p. 10.

[198] Comments of Office of Communication of the United Church of Christ, p. 14.

APPENDIX C: BREAKDOWN OF LEISURE ACTIVITES*

	% of total time acccounted for by each activity	
Leisure Activity	**1970**	**1988**
Television	46.5	45.3
Network affiliates		26.3
Independent stations		10.7
Basic cable programs		5.5
Pay cable programs		2.8
Radio	33.1	33.9
Home		16.4
Out of home		17.5
Newspapers	8.3	5.3
Records & tapes	2.6	6.4
Magazines	6.5	3.2
Leisure books	2.5	2.8
Video games (home)		0.4
Movies	0.4	0.4
Spectator Sports	0.1	0.4
Videocassette recorders		1.8
Video games (arcade)		0.1
Cultural events	0.1	0.1
Total	100.0**	100.0**

* These data come from Table 1.3: Time spent by adults on selected leisure activities, 1970 and 1988, published in H. L. Vogel, Entertainment Industry Economics: A guide for financial analysis, (2nd edition, 1992, Cambridge University Press).

** Due to rounding, these columns do not added up to 100 exactly.

APPENDIX D: BREAKDOWN OF ADVERTISING REVENUES*

MEDIUM		1990	1991	1992	1993
TELEVISION	Total	28,405	27,402	29,409	30,584
	Network	9,383	8,933	9,549	10,209
	Syndication (national)	1,288	1,853	2,070	1,576
	Spot (national)	7,354	7,110	7,551	7,800
	Spot (local)	7,612	7,565	8,079	8,435
	Cable (national)	1,197	1,521	1,685	1,970
	Cable (local)	330	420	475	594
RADIO	Total	8,323	8,476	8,654	9,457
	Network	476	490	424	458
	Spot	1,547	1,575	1,505	1,657
	Local	6,300	6,411	6,725	7,342
NEWSPAPERS	Total	32,368	30,409	30,737	32,025
	National	3,720	3,685	3,602	3,620
	Local	28,414	26,724	27,135	28,405
MAGAZINES	Total	6,803	6,524	7,000	7,357
	Weeklies	2,864	2,670	2,739	2,850
	Women's	1,713	1,671	1,853	2,009
	Monthlies	2,226	2,183	2,408	2,498
DIRECT MAIL	Total	23,370	24,460	25,391	27,266
OUTDOOR	Total	1,084	1,077	1,031	1,090
	National	640	637	610	605
	Local	444	440	421	485

MEDIUM		1990	1991	1992	1993
YELLLOW PAGES	Total	8,926	9,182	9,320	9,517
	National	1,132	1,162	1,188	1,230
	Local	7,794	8,020	8,132	8,287
FARM PUBLICATIONS	Total	215	215	231	243
BUSINESS PUBLICATIONS	Total	2,875	2,882	3,090	3,260
MISCELLANEOUS	Total	15,955	15,773	16,427	17,281
	National	11,608	11,588	12,124	12,759
	Local	4,347	4,185	4,303	4,522
TOTAL	National	72,780	72,635	76,020	80,010
	Local	55,860	53,765	55,270	58,070
GRAND TOTAL		128,640	126,400	131,290	138,080

* These data were prepared for Advertising Age by McCann-Erickson Inc., and represent in millions of dollars, total expenditures by advertisers (not merely receipts by media).

APPENDIX E: RELEVANT PRODUCT MARKET ALTERNATIVES**

1. Market for delivered video programming

Suppliers of Substitutes	Geographic Dimensions of Market	Metrics of Concentration
broadcast television stations*	U.S. Borders	Number of independent operators/suppliers*
cable system operators*	DMA	Number of separate channels
direct satellite operators*	Contour B	Audience share of each channel
wireless cable operators*	Contour A*	Audience share of each supplier*
telephone companies*		
video cassette recorders		

2. Market for National Advertising

Suppliers of Substitutes	Geographic Dimensions of Market	Metrics of Concentration
commercial broadcast television networks*	U.S. borders*	Number of independent suppliers*
commercial cable television networks*	DMA	Revenue share of each supplier*
direct satellite networks*	Contour B	
national magazine publishers	Contour A	
national newspaper publishers		
radio networks		
direct mail		

3. Market for Local Advertising

Suppliers of Substitutes	Geographic Dimensions of Market	Metrics of Concentration
broadcast television stations*	U.S. borders	Number of independent suppliers*
cable system operators*	DMA*	Revenue share of each supplier*
radio station operators*	Contour B	
newspaper operators*	Contour A*	
direct mail		

4. Market for Video Program Production

Purchasers of Video Programs	Geographic Dimensions of Market	Metrics of Concentration
broadcast television networks*	U.S. borders*	Number of independent purchasers*
cable television networks*	DMA	Expenditures of each purchaser on first run video programs
direct satellite networks*	Contour B	Expenditures of each purchaser on video programs*
broadcast television stations*	Contour A	

** Items with single asterisk represent our tentative selection of the alternatives considered. Because competition concerns and diversity concerns sometimes suggest different units of measure, there may be more than one metric of concentration selected.

Separate Statement
of
Commissioner James H. Quello

In the Matter of: Review of the Commission's Regulations Governing Television Broadcasting (MM Docket No. 91-221, 87-8)

In general, I support the three items we have adopted today to reexamine the Commission's television multiple ownership rules, the broadcast attribution rules, and our incentives to promote minority and female ownership of mass media facilities.

I have long been outspoken in my support for relaxing the television multiple ownership rules so that television broadcasters can be freed up to compete in this increasingly competitive **multichannel** world. Rules that may have been necessary 10 years ago when fewer video options were available to viewers may no longer be necessary given the dramatically different landscape of today: a land where consumers are able to graze through potentially hundreds of channels, talk back to their television sets, order goods and services, play video games, and order movies they want to see, when they want to see them. For television broadcasters, who currently have available to them in any given market one video channel, the regulatory barriers this Agency imposes should be minimally instrusive to allow broadcasters to deal most efficiently with the competitive barriers they face in the marketplace. Diversity remains a vitally important goal; and yet, if broadcasters become dinosaurs in the video marketplace of tomorrow, diversity could become an endangered species.

Toward this end, we should consider very carefully the following: increasing the national ownership limits, particularly the audience reach cap; modifying the relevant measure for determining compliance with the television duopoly from the Grade B to the Grade A contours of the subject stations; allowing common ownership of two UHF stations in the same market; and eliminating the radio-television cross-ownership rule.

Perhaps more important, we should not undermine any deregulatory strides that we make in this proceeding by taking regulatory strides backward in the attribution proceeding. I will closely scrutinize any efforts to tighten up our attribution rules to ensure that they do not have a chilling effect on the ability of broadcasters, including minority, female and small broadcasters, to secure financing. This financing is particularly crucial now, when the turn of the next century will demand investment in new technologies to ensure the continuing vitality of free, over the air television and radio.

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SEPARATE STATEMENT
OF
COMMISSIONER SUSAN NESS

RE: *TV Ownership (MM Docket No. 91-221, 87-8)*

This Further Notice of Proposed Rulemaking ("Further Notice") reaffirms the special role played by free, over-the-air television in our society as well as the importance of competition and diversity in the local marketplace. I strongly support these concepts.

The Further Notice reflects our commitment periodically to review our rules to determine whether they remain necessary, appropriate, and not unduly burdensome. Much has changed since this proceeding was initiated and, fortunately, many of the changes bode well for the future of broadcast television.

When the proceeding was initiated over three years ago, broadcast television was widely thought to be facing irreversible decline. An FCC staff study had concluded that over-the-air broadcasting was in serious difficulties, which were expected to worsen gradually over the next decade. In fact, when that report was written, many TV stations were on the auction block. Sales were at depressed multiples of cash flow. It was against this backdrop that the proposals in the first Notice of Proposed Rulemaking were developed to improve the prospects for the financial survival of television.

To paraphrase Mark Twain, reports of the demise of broadcast television proved to be greatly exaggerated. The past two years have been among the best ever. Acquisition cash flow multiples are at record levels. The fourth network has risen dramatically in popularity and a fifth and sixth network have been launched. Broadcasters have even added new revenue streams through strategic partnerships with alternative video program providers.

Moreover, even though cable penetration has continued to increase, viewership of broadcast channels appears to have stabilized. The vast majority of television viewing -- more than 75% -- continues to be of broadcast channels, even when watched on cable. Indeed, cable carriage has improved signal coverage parity between VHF and UHF stations.

Despite these encouraging developments, however, the future is still unpredictable. Change and uncertainty abound.

Network affiliations are in an upheaval, with group owners making wholesale affiliation changes, partly as a result of the rise of new networks. DBS is now off the drawing boards, into several hundred thousand homes, and continuing to grow by leaps and bounds. Video dialtone operations may present broadcasters with the challenge of increased competition from new program sources. Later this year, the Commission will consider changing the prime-time access rule and complete its promised review of the financial interest and syndication rules. And digital television is on the horizon.

Collectively, these forces are changing the current broadcast environment. Appropriately, this Further Notice seeks comment on our current television ownership rules and possible changes to them.

In this item the Commission has moved forward with several proposals which would profoundly affect the marketplace. For example, the Commission proposes to relax the national ownership rules to eliminate the ceiling on the number of stations that can be owned, and to increase the "reach" gradually from 25% of the nation's viewers to perhaps as much as 50% over a period of years. In addition, the Commission proposes to relax the duopoly rule to reduce the minimum mileage separation between commonly owned stations from a Grade B to a Grade A contour. It further proposes to eliminate the one-to-a-market rule, which has prohibited common ownership of radio and television stations in the same market.

Each of these modifications, if adopted, will strengthen free, over-the-air television broadcasting and will provide new opportunities for broadcasters to leverage their investment without seriously compromising diversity and marketplace competition. Based on the record to date, I support all of these initiatives.

Our Further Notice also seeks comment on whether to relax further the duopoly rules. Those rules were designed to promote competition and diversity by prohibiting common ownership of competing stations in a local market. Here, I maintain an open mind but I am inclined to place the burden of proof on those who favor changing these rules.

There are many options open to the Commission on further relaxation of the duopoly rule. We can, for example:

- maintain a fairly strict standard for granting waivers, based upon hardship or other extenuating factors;
- establish a presumptive rule for waivers, based upon diversity in the marketplace and/or other factors;
- revise the rules to permit duopoly in specified circumstances; or
- eliminate the rules outright.

The Further Notice takes no position on the relative merits of these options, but requests public comment. I look forward to reviewing the comments on this item. Given all of the other changes in this dynamic market, however, I believe there may be considerable risk -- to competition and to diversity -- in making substantial changes to the duopoly rules beyond adjusting the contour overlap test. There are far fewer television stations in a market than there are radio stations, so a policy permitting combined ownership of two licensees in the same market deserves greater scrutiny. Also, if the rules are changed, we may set off races to merge if owners fear that those who are slow to combine may be precluded from doing so if the market becomes overly concentrated. I am also concerned that programmers might face reduced opportunities to find outlets at competitive prices for their syndicated programming, and that the

growth of the new networks could be stunted if consolidations in the local market work to exclude a new network affiliate.

Ubiquitous, free over-the-air television properly enjoys a special place in the American experience. As we evaluate the comments in response to the Further Notice, I hope we will strive to formulate rule changes that promote this service. We should eliminate anachronistic restrictions which hamper the growth of broadcast television, but we should not endanger our cherished values of diversity and competition.

Before the
FEDERAL COMMUNICATIONS COMMISSION FCC 94-324
Washington, D.C. 20554

In the Matter of	)	
	)	
Review of the Commission's	)	MM Docket No. 94-150
Regulations Governing Attribution	)	
of Broadcast Interests	)	
	)	
Review of the Commission's	)	MM Docket No. 92-51
Regulations and Policies	)	
Affecting Investment	)	
in the Broadcast Industry	)	
	)	
Reexamination of the Commission's	)	MM Docket No. 87-154
Cross-Interest Policy	)	

NOTICE OF PROPOSED RULE MAKING

Adopted: December 15, 1994 Released: January 12, 1995

Comment Date: April 17, 1995
Reply Comment Date: May 17, 1995

By the Commission:

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Appendix: Initial Regulatory Flexibility Analysis

I. Introduction

1. With this Notice, we commence a thorough review of our broadcast media attribution rules,[1] the rules by which we "define what constitutes a 'cognizable interest' for the purpose of applying the multiple ownership rules to specific situations."[2] The multiple ownership rules limit the number of broadcast stations that a single person or entity, directly or indirectly, is permitted to own, operate, or control, so as to foster programming diversity by encouraging diversity of ownership, and to assure competition in the provision of broadcast services. [3]

2. A number of changes in the broadcasting industry and in other Commission Rules

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[1] The broadcast attribution rules are set out in Notes to 47 C.F.R. § 73.3555. Our current attribution rules were adopted in Report and Order in MM Docket No. 83-46, 97 FCC 2d 997 (1984) ("Attribution Order"), recon. granted in part, Memorandum Opinion and Order in MM Docket No. 83-46, 58 RR 2d 604 (1985) ("Attribution Reconsideration"), further recon. granted in part, Memorandum Opinion and Order in MM Docket No. 83-46, 1 FCC Rcd 802 (1986) ("Attribution Further Reconsideration").

[2] Attribution Order, 97 FCC 2d at 999. Generally, we do not consider interests that fall below the attribution benchmarks or those that are exempted or excluded under the attribution rules as of concern in determining whether a licensee or applicant is in compliance with our multiple ownership rules.

[3] An analysis of the Commission's diversity and competition policies, discussed in connection with our review of the television multiple ownership rules, is contained in the Further Notice of Proposed Rule Making in MM Docket No. 91-221 ("Review of the Commission's Regulations Governing Television Broadcasting"), FCC 94-322 (adopted Dec 15, 1994).

since our last revision of the attribution rules prompt us to initiate this review.[4] First, the multiple ownership rules themselves, to which the attribution rules are related, are undergoing change. We have relaxed our radio multiple ownership rules,[5] we have narrowly relaxed our radio-television cross-ownership rule,[6] and, today, in a separate proceeding, we seek comments as to whether we should relax national and local multiple ownership limits for television stations, including the one-to-a-market rule.[7] In an additional separate proceeding adopted today, we also are considering a variety of measures, including relaxing our attribution rules, to aid the entry of minorities and, if deemed necessary, women into broadcasting. We wish to ensure that the attribution rules remain effective in light of the previous and proposed relaxation of the multiple ownership rules.

3. Other concerns merit a reevaluation of our attribution rules. For example, concerns have been raised that certain nonattributable investments, while completely permissible, may permit a degree of influence that warrants their attribution for multiple

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[4] We note that the Commission is statutorily prohibited from expending any of its appropriated funds "to repeal, to retroactively apply changes in, or to begin or continue a reexamination of the rules and the policies established to administer such rules of the Federal Communications Commission as set forth at section 73.3555(d) of title 47 of the Code of Federal Regulations, other than to amend policies with respect to waivers of the portion of section 73.3555(d) that concerns cross-ownership of a daily newspaper and an AM or FM radio broadcast station." Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1995, Pub. L. No. 103-317, 108 Stat. 1724, 1738 (1994). Section 73.3555(d) prohibits ownership of a daily newspaper and a broadcast station in the same market. We invite comment on whether the proposed changes to the attribution rules fall within the scope of the prohibition and should be limited accordingly.

[5] Revision of Radio Rules and Policies, 7 FCC Rcd 2755 (1992), recon. granted in part, 7 FCC Rcd 6387 (1992), further recon., FCC 94-267 (released Nov. 8, 1994), 59 Fed. Reg. 62,609 (Dec. 6, 1994), 9 FCC Rcd 7183 (1994).

[6] See 47 C.F.R. § 73.3555, Note 7.

[7] See Further Notice of Proposed Rule Making in MM Docket No. 91-221, FCC 94-322 (adopted Dec. 15, 1994). We note that in two pending proceedings we sought comment on certain proposed amendments to the attribution rules and our cross-interest policy. Notice of Proposed Rule Making and Notice of Inquiry in MM Docket No. 92-51, 7 FCC Rcd 2654 (1992); Further Notice of Inquiry/Notice of Proposed Rule Making in MM Docket No. 87-154, 4 FCC Rcd 2035 (1989). We issue this Notice to update the existing record in these proceedings, expand the areas of inquiry, and consolidate pending broadcasting attribution issues into one omnibus proceeding.

ownership purposes.[8] Moreover, we are concerned that otherwise permissible cooperative arrangements between broadcasters, which seem to be occurring more frequently in recent years, are being used in combination by those broadcasters to obtain, indirectly, controlling interests in multiple stations that they would be prohibited from holding directly under the multiple ownership rules. Further, we have received applications in which the applicant utilizes a new business form, such as a Limited Liability Company ("LLC"), and we intend to consider how to treat such new business forms for attribution purposes. Finally, we have recently adopted or revised attribution rules for other services that we regulate, and we seek to review the broadcast attribution rules in light of those other attribution rules to ensure that any differences are justified by other factors such as differences between the media or our policies regulating them.

4. In considering revisions to the mass media attribution rules, we seek to identify and include those positional and ownership interests that convey a degree of influence or control to their holder sufficient to warrant limitation under the multiple ownership rules. As we have noted, the attribution rules "represent the Commission's judgment regarding what ownership interest in or relation to a licensee will confer on its holder that degree of influence or control over the licensee and its facilities as should subject it to limitation under the multiple ownership rules."[9] For purposes of the multiple ownership rules, the concept of "control" "is not limited to majority stock ownership, but includes actual working control in whatever manner exercised."[10] We have defined "de jure" control as ownership of more than 50 percent of a corporation's outstanding voting stock.[11] We have determined who has "de facto" control of a licensee on a case-by-case basis, looking generally for this purpose to determine who has ultimate control over a licensee's programming, financial and personnel policies.[12] Where we have referred to "influence," we have viewed it as an interest that is less than controlling, but through which the holder is likely to induce a licensee or permittee

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[8] For example, concerns have been raised recently that networks, while securing interests in stations that do not trigger attribution of an ownership interest, may nevertheless have used (nonvoting or otherwise nonattributable) equity investments to influence station affiliation decisions. See Christopher Stern, "Small Investments Yield Big Benefits," Broadcasting & Cable, October 17, 1994, at 26.

[9] Attribution Order, 97 FCC 2d at 999.

[10] 47 C.F.R. § 73.3555, Note 1.

[11] See Attribution Order, 97 FCC 2d at 1018 n. 47; Metromedia, Inc., 98 FCC 2d 300, 306 (1984), recon. denied, 56 RR 2d 1198 (1985), appeal dismissed sub nom., California Association of the Physically Handicapped v. FCC, 778 F.2d 823 (D.C. Cir. 1985).

[12] See, e.g., Southwest Texas Public Broadcasting Council, 85 FCC 2d 713, 715 (1981); Stereo Broadcasters, Inc., 55 FCC 2d 819, 821 (1975).

to take actions to protect the investment.[13] Our judgment as to what level of "influence" should be subject to restriction by the multiple ownership rules has, in turn, been based on our judgment regarding what interests in a licensee convey a realistic potential to affect its programming and other core operational decisions.[14]

5. While our focus is on the issues of influence or control, at the same time, we must tailor the attribution rules to permit arrangements in which a particular ownership or positional interest involves minimal risk of influence, in order to avoid unduly restricting the means by which investment capital may be made available to the broadcast industry.[15] We intend to ensure that any revisions we make to the attribution rules meet these stated goals. We also seek to ensure that any new rules adopted are clear to our broadcast regulatees, provide reasonable certainty and predictability to allow transactions to be planned, ensure ease of processing, and provide for the reporting of all the information we need in order to make our public interest finding with respect to broadcast applications.

II. Background and Current Rules

6. The attribution rules have evolved gradually since their inception,[16] in response to changes in the broadcast industry, including the growth of and changes in sources of capital investment. In adopting the first attribution rules in 1953, in conjunction with the "seven-station" multiple ownership rule, the Commission considered the issue of control of business organizations and sought to ensure that it would not miss any potentially influential interests.[17] Specifically, believing that the holder of a small interest could exert a considerable influence on the operation of a station, the Commission decided to attribute all voting shares in a closely-held company, and, for companies with more than 50 voting shareholders, all voting shares of one percent or more of the outstanding voting stock.[18] In addition, noting the influence of officers and directors over a licensee's day-to-day activities, and citing federal antitrust statutes dealing with interlocking directorships and officerships, the Commission held cognizable the interests of officers and directors of licensees, whether

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[13] See, e.g., Amendment of Multiple Ownership Rules, 18 FCC 288, 292-93 (1953) ("1953 Multiple Ownership Rules").

[14] Attribution Order, 97 FCC 2d at 1005.

[15] See, e.g., Attribution Order, 97 FCC 2d at 1020.

[16] As noted above, the attribution rules govern application of the multiple ownership rules, which are intended to promote diversity and competition.

[17] 1953 Multiple Ownership Rules, 18 FCC at 292-93.

[18] 1953 Multiple Ownership Rules, 18 FCC at 293-94.

or not they held stock in the licensee.[19]

7. As new types of equity investments and financial instruments were introduced into the financial markets and the broadcast industry, the nature of the financial markets themselves continued to change. Large institutional investors began to hold larger portfolios and to contribute larger amounts of capital to the market. Taking note of the purposes and operation of investment companies, brokerage houses, and certain trusts, in particular, among these larger investors, the Commission observed that while these entities acquired voting stock in their own name, they often held it solely for the benefit of other entities. Therefore, the Commission responded by attributing corporate voting stock solely to the entities with the right to vote that stock.[20] Also, we observed that certain institutional entities were generally acquiring their stock for investment purposes, with no intent to influence or control the broadcast licensees in question. Thus, we defined them as "passive" investors. Accordingly, we gradually increased the attribution benchmarks for certain institutional "passive" investors (investment companies, insurance companies and bank trust departments).[21] Ownership is generally attributed to a stockholder whose voting shareholdings equal or exceed the voting stock attribution benchmark. This may be of concern for banks and other passive investors, which hold stock for investment purposes only in many different media outlets.

8. The attribution rules were last revised over a two-year period between 1984 and 1986. At that time, the Commission raised the attribution benchmark for voting stock from 1 percent to 5 percent, after exhaustive study and analysis, including a thorough survey of its ownership files to determine the size of typical stockholdings, and a review of other federal agency benchmarks.[22] That decision reflected changes in the broadcasting industry and the Commission's perception of the changing roles of smaller voting shareholders. The Commission concluded that 1 percent shareholders were extremely unlikely to be able to exert any influence over a corporate licensee and that their influence was de minimis in comparison with that of firm managers and of more sophisticated large shareholders with greater holdings. The Commission also raised the attribution level for voting stock held by certain institutional investors (bank trust departments, investment companies, and insurance

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[19] 1953 Multiple Ownership Rules, 18 FCC at 293.

[20] Report and Order in Docket No. 15627, 13 FCC 2d 357, 363 (1968) ("1968 Attribution Rules").

[21] Id. at 369 (mutual funds from 1% to 3%); Report and Order in Docket No. 18751, 34 FCC 2d 889, 891-92 (1972) ("1972 Attribution Rules") (bank trustees from 1% to 5%); Report and Order in Docket No. 20520, 59 FCC 2d 970 (1976), recon. granted in part, 65 FCC 2d 336 (1977), aff'd sub nom. National Citizens Committee for Broadcasting v. FCC, 559 F.2d 187 (D.C. Cir. 1977) ("1976 Attribution Rules") (investment companies from 3% to 5%, and insurance companies and banks from 1% to 5%).

[22] Attribution Order, 97 FCC 2d at 1003-1012.

companies) from 5 percent to 10 percent on the grounds that their passive investor status warranted adopting a higher benchmark.[23]

III. Recent Proceedings

9. In recent years, the Commission has instituted other proceedings that have begun to reexamine the assumptions upon which the attribution rules and cross-interest policy[24] rest and to determine whether they continue to serve the public interest. These reexaminations were prompted by significant changes in the video marketplace and the broadcasting business, including greatly increased competition and the past economic downturn in the industry. In issuing this Notice to review our current attribution rules, we have elected to consolidate and comprehensively reexamine these other pending proceedings that directly or indirectly implicate the attribution rules. Specifically, in 1992, in our Notice of Proposed Rule Making and Notice of Inquiry in MM Docket No. 92-51, 7 FCC Rcd 2654 (1992) ("Capital Formation Notice"), we sought comments on whether we should relax several of our attribution rules in a number of specific contexts in order to stimulate investment in the broadcast industry and to benefit new entrants, including minorities and women, who have historically experienced significant difficulties in securing adequate start-up funding.[25] We inquired as to whether we should relax our attribution benchmarks for active and passive stockholders, and modify our insulation criteria as to widely-held limited partnerships, including business development companies organized as such. We will incorporate the record from MM Docket No. 92-51 into the record of this proceeding to the extent that it is relevant to our consideration of the foregoing issues.[26]

10. We will also consider in this proceeding the comments received in response to our Further Notice of Inquiry/Notice of Proposed Rule Making in MM Docket No. 87-154, 4

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[23] Attribution Order, 97 FCC 2d at 1012-17.

[24] The Commission's cross-interest policy prevents individuals from having "meaningful" cross-interests in two broadcast stations, or a daily newspaper and a broadcast station, or a television station and a cable television system, when both outlets serve "substantially the same area." Notice of Inquiry in MM Docket No. 87-154, 2 FCC Rcd 3699 (1987). At present, the following are viewed as "meaningful" relationships subject to the policy, which is enforced on an ad hoc, case-by-case basis: key employees, joint ventures, and nonattributable equity interests. Further Notice of Inquiry/Notice of Proposed Rule Making in MM Docket No. 87-154, 4 FCC Rcd 2035 (1989).

[25] Capital Formation Notice, 7 FCC Rcd 2654 (1992).

[26] In the Capital Formation Notice, 7 FCC Rcd at 2657-59, we also asked whether we could, under the Communications Act, and should, for policy reasons, permit the holding of security and reversionary interests in licenses. We will resolve that issue in a separate proceeding.

FCC Rcd 2035 (1989) ("Cross-Interest Notice"), in which we asked for comments as to whether we should maintain our cross-interest policy in three areas -- key employees, non-attributable equity interests, and joint ventures. In the Cross-Interest Notice, we invited comment as to whether we should amend the attribution rules to incorporate the key employee portion of the cross-interest policy. We will incorporate the record from MM Docket No. 87-154 into the record of this proceeding.

11. We note that this proceeding is complementary with, and will affect our actions in, two rulemaking proceedings in which we have today adopted Notices: the pending rule making regarding the multiple ownership rules for television stations;[27] and a companion proceeding inviting comment on whether we should adopt a number of rule changes and initiatives to provide minorities and women with greater opportunities to enter the mass media industry.[28] We specifically seek comment in the latter proceeding as to whether we should relax our mass media attribution rules to help minority- and women-owned businesses raise capital. Since the content of the attribution rules is critical to issues raised in both proceedings, we will review the comments received in those proceedings in conjunction with the comments received in the instant proceeding to assure a coordinated approach to the three proceedings.

IV. **Underlying Principles**

12. As we undertake our analysis of the nature and size of interests in broadcast licensees that should be held cognizable for ownership attribution purposes, we are guided by basic economic concepts as to the essential nature of firms, their control, and their conduct. We invite comment on our analysis and encourage parties to support their views with relevant empirical analysis and business and economic theories. We also invite commenters to propose alternative analytical frameworks for establishing the specific interests that should be deemed cognizable under our various multiple ownership rules. Our analysis will focus essentially upon the effect that financial claims on, and associated voting or contractual rights in, broadcasting companies have on their conduct.[29] The economic conduct of concern to us

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[27] See Notice of Proposed Rule Making in MM Docket No. 91-221, 7 FCC Rcd 4111 (1992). We have adopted a Further Notice of Proposed Rule Making in that proceeding today. Further Notice of Proposed Rule Making in MM Docket No. 91-221, FCC 94-322 (adopted Dec. 15, 1994).

[28] Notice of Proposed Rule Making in MM Docket Nos. 94-149 and 91-140, FCC 94-323 (adopted Dec. 15, 1994).

[29] The various financial claims on a broadcaster may range from the interests of various kinds of equity holders, to different debtholders, and to contractual relationships, including those with suppliers and consumers of various materials and services, such as, for example, professional managers. Each of these financial claims establishes a relationship between the claimant and the licensee that may give rise to that claimant's ability to influence, directly or

relates to a broadcasting company's programming choices, including affiliation choices, and competitive practices, including advertising pricing. To address these issues with a desirable degree of confidence, we will need as much information as is available to establish the connections and thresholds of concern between financial claims on a firm and its conduct.

13. Accordingly, with respect to each specific ownership or relational interest discussed herein, we seek comment on whether the level or degree of ownership interest in, or relationship to, a licensee would be likely to impart the ability to influence or control the operations of the licensee, including core functions such as programming, such that the multiple ownership rules should be implicated. We intend to base our judgment with respect to each specific attribution limit or criterion considered in this Notice on as much empirical data as can be obtained, as well as economic and business theories on levels of influence in business organizations, as discussed above, and we specifically invite comments that contain such data and are grounded in rigorous economic theories and analyses. In setting a specific attribution limit or determining whether a particular interest should be cognizable or not, we ask commenters to address the degree to which we should attempt to accommodate the competing concerns that have motivated us in the past, such as not inhibiting legitimate business opportunities and encouraging the flow of capital investment into the broadcast industry. An important consideration is the extent to which we can and should accommodate these interests directly, by, for example, creating specific provisions in the ownership rules themselves. In every case, if the new rule or exemption proposed represents a departure from our current rules and standards, commenters should demonstrate the justifications for such a departure. Additionally, in light of our desire to promote ownership opportunities for minorities and women in the broadcasting industry, we invite comment on whether there are other attribution rules, besides those discussed in MM Docket Nos. 94-149 and 91-140, that should be adjusted to promote access to capital for minorities and women.[30]

14. We seek empirical data and analysis that would indicate the ownership level that would likely impart to its holder some ability to influence the operation of a broadcast station in a manner that is intended to be limited by our multiple ownership rules. Also, we seek data and/or analysis, based on sound economic principles, to demonstrate that changing the attribution rules would have a significant effect on capital investment and new entry. We also seek detailed economic data regarding how the capital needs and outlays of broadcasters have changed since the current attribution rules were set, as well as since the earlier set of comments were submitted in response to the Capital Formation Notice, and any impediments to adequate financing imposed by the current rules.

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indirectly, some aspect of a licensee's operation.

[30] In our companion Notice in MM Docket Nos. 94-149 and 91-140, we request current data regarding female ownership of mass media facilities to determine whether women are underrepresented as mass media owners.

15. We are concerned that any action that we take in this proceeding not inhibit capital investment nor disrupt existing financial arrangements, and we seek comment as to both of these areas with respect to our proposals herein. We also seek comment on whether, and, if so, to what extent, we should grandfather existing situations if any modifications we make to the attribution rules, for example, restricting the availability of the single majority shareholder exemption or attributing nonvoting stock, would result in a new attribution of ownership to an entity for a previously held interest, and that new attribution would result in a violation of the multiple ownership rules. Alternatively, should we permit a transition period, during which licensees could come into compliance with the multiple ownership rules, as affected by any changes we make in the attribution rules?

16. We recognize now, as we did in the Attribution Order,[31] that any specific benchmark or limit that we adopt will not include every influential interest that might be limited by the multiple ownership rules. A particular holding or interest not considered cognizable under our rules may, in the context of the structure of a particular business, including the relative distribution of ownership interests in that company, permit a degree of influence or control that should be regulated under the multiple ownership rules. On the other hand, a rule of general applicability drawn so strictly as to include every possible influential interest would ensnare innumerable interests that have no ability to impart influence or control over a licensee's core decision-making processes to their holders. Weighing these considerations, we preliminarily conclude that our goals of predictability and certainty can best be achieved if we continue to use benchmarks and specific attribution limits rather than proceeding on an ad hoc basis. Of course, we retain the discretion to treat specific factual situations on a case-by-case basis.[32] Commenters may, of course, address these basic propositions.

V. Stockholding Benchmarks

17. In devising our attribution rules, we proceed on the basis of certain assumptions. As noted above, our attribution rules focus on the issues of influence on and control of a firm. While the potential for influence may be inherent in a broad range of interests, for economic reasons, equity holders govern or control the management of the firm. Consequently, as we examine control of and influence in a firm, we should first concentrate on equity holders and address whether or not particular equity holdings have the potential to control or influence the firm and its activities. In this Notice, we invite comment on whether to revise our treatment of corporate shareholders for attribution purposes. First, we invite additional comment on whether to raise the benchmarks for voting shares from 5 percent to 10 percent and from 10 percent to 20 percent for certain passive investors. Second, we

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[31] 97 FCC 2d at 1006.

[32] See, infra, Section VIII (seeking comments on whether case-by-case oversight is necessary for certain cross interests and multiple business interrelationships).

invite comment on whether we should restrict the availability of the single majority shareholder exemption from attribution. Finally, we seek comment on whether we should attribute nonvoting shares, at least in certain circumstances.

A. Voting Stock

18. We now attribute ownership to holders of 5 percent or more of the voting shares of corporations.[33] We do not attribute the shares of nonvoting shareholders, regardless of the percentage of the equity of the corporation contributed by those shareholders or the percentage of the nonvoting shares that they hold.[34]

19. We adopted the current benchmarks in 1984, based on our finding that the previous benchmarks had become unduly restrictive as a result of changes in the broadcast industry and in the investment community.[35] We further observed that a relaxation of the attribution benchmark would serve the public interest by increasing investment in the industry and by promoting the entry of new participants by increasing the availability of start-up capital.[36] In approaching the attribution benchmark issue, we looked to other federal agencies for analogous ownership thresholds and examined other data.[37]

20. We selected the 5 percent benchmark because, according to our examination, a 5 percent shareholder in a widely-held corporation would typically be one of the two or three largest corporate shareholders and thus could potentially influence a licensee's management and operations. Accordingly, we determined that shareholders meeting the 5 percent

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[33] 47 C.F.R. § 73.3555, Note 2(a). As discussed infra ¶ 47, the benchmark for certain passive investors is 10 percent.

[34] 47 C.F.R. § 73.3555, Note 2(f).

[35] Attribution Order, 97 FCC 2d at 1002. For widely-held corporations, these changes were: (1) the diminished ability of a 1 percent stockholder to exercise any influence over a widely-held corporation, due to the general increase in the number of small shareholders; and (2) the decreasing exercise of shareholder rights by their owners due to both the growing sophistication of company management and the rising participation in the stock market by people without management sophistication. Id. at 1004-07. In adopting the current benchmarks, we abandoned the previous distinction between widely-held and closely-held corporations, finding, with respect to closely-held corporations, that a 5% benchmark was also appropriate and would eliminate attribution for most noncontrolling and noninfluential stock interests. Id. at 1007-08.

[36] Id. at 1002, 1007-08, 1012.

[37] In particular, we surveyed the Commission's ownership files to determine the typical size and distribution of stockholding among licensees. Id. at 1002-07, 1009-10.

benchmark would likely have the potential for influencing or controlling a licensee, while those with smaller stockholdings would likely not have such potential. We found other regulatory support for the 5 percent threshold in the Securities and Exchange Commission's ("SEC") rules that require the reporting of ownership interests of 5 percent or greater.[38] The SEC's reporting threshold was intended to protect shareholders' ability to make informed investment decisions by providing them with timely information regarding potential tender offers and other potential changes in corporate ownership or control. We concluded that the objectives of this requirement most closely paralleled in purpose our own objectives in identifying interests with the potential for significant influence or control.[39]

21. In the Capital Formation Notice, we proposed to increase the general attribution benchmark for voting stock from 5 percent to 10 percent in order to stimulate capital investment. With respect to this proposal, we asked commenters how we might preserve investment flexibility while adequately accounting for all influential interests that merit scrutiny under our rules. Based on the record thus far, we do not have information sufficient to justify raising the benchmark to 10 percent. Commenters addressing this issue unanimously supported raising the benchmark,[40] but they did not provide us with critical information we would need before we could conclude that raising the benchmark to 10 percent would not exclude many substantial and influential interests from attribution, or that such exclusion is warranted by competing needs of greater weight. Specifically, commenters asserted that the changes in the economic and competitive environment of the media marketplace since the mid-1980s necessitated revisions in the attribution rules. In addition, they argued that such an increase in the attribution benchmark would facilitate additional investment in the broadcast industry while continuing to adequately identify ownership interests that afford influence or control over a licensee's management or operations. They did not, however, provide us with enough information on the changes in the economic climate and competitive marketplace that would justify raising the benchmark or explain and verify the link between raising the attribution benchmark and precipitating additional capital investment. Without such information, we are not comfortable raising the benchmark.

22. In particular, before we could consider raising the attribution benchmark to 10 percent, we would need answers to the general questions raised in paragraphs 12 through 16

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[38] Securities and Exchange Act § 13(d), 15 U.S.C. § 78m(d).

[39] Attribution Order, 97 FCC 2d at 1006-07, 1009.

[40] See Comments of A.H. Belo Corporation et al. ("Belo"), Great American Television and Radio Company, Inc. ("Great American"), National Association of Broadcasters ("NAB"), National Association of Investment Companies ("NAIC"), Canadian Imperial Bank of Commerce ("CIBC"), and the Investment Company Institute ("ICE"). Belo asserted that other federal agencies use ownership benchmarks well above 10 percent to define controlling interests of entities under their jurisdiction, although Belo did not sufficiently define the relevance of these benchmarks to the goals of our attribution and multiple ownership rules

supra, as well as the following specific issues. While commenters argued that a less than ten percent stockholding is not, in itself, sufficient to presume that the holder could exert control or influence over the corporation, they do not explain the basis for that claim or provide any specific information that would allow us to devise a methodology to assume that such a stockholder would remain inactive in the affairs of the company in most or all cases. Moreover, we ask commenters whether such factors as the size, composition of management, and minority shareholder rights of individual corporations might not be increasingly relevant where larger nonattributable stockholdings are permitted. We therefore ask commenters to provide detailed illustrations of the role of minority shareholders in the management of a corporation. In addition, we seek more detailed information about the impact of minority shareholder rights on corporate management generally, particularly in those instances where individual minority shareholders might act in concert with others to affect the decision making of the corporate licensee or permittee.

23. In the Attribution Order, we concluded that the adoption of a benchmark higher than 5 percent may result in many substantial and influential interests being overlooked and that the need to adopt a higher threshold was unclear since every demonstrable benefit to be derived from relaxing the attribution rules would be achievable in large measure from adopting a 5 percent benchmark.[41] We ask commenters to provide evidence that the specific conclusions we reached in the Attribution Order are no longer valid. In particular, we noted in the Capital Formation Notice that our prior determination not to adopt a 10 percent benchmark had been made in economic and competitive circumstances materially different from those prevailing when the Capital Formation Notice was adopted.[42] Do current market conditions cast doubt on the foregoing conclusions made in the Attribution Order, and, if so, what evidence is there that, based on market conditions, raising the attribution benchmark to 10 percent will not incur the risks of ignoring substantial controlling or influential interests that concerned us in 1984? What interests or reasons might justify nonattribution of such substantial interests?

24. With respect to the issue of facilitating increased capital investment, we seek answers to the following questions. Is there support for the assumption that an increased attribution benchmark will result in greater capital investment? If so, how would any increased availability of or reduced cost of capital resulting from an increased attribution benchmark be likely to be allocated between smaller, less established broadcasters and larger, more established ones? Should we be concerned that proportionately increasing the capital available to larger entities or reducing its cost to them might actually strengthen those licensees that already dominate the broadcast industry, thereby threatening competition and diversity? Analyses of these effects at several different hypothetical attribution benchmarks are requested.

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[41] Attribution Order, 97 FCC 2d at 1006-07.

[42] Capital Formation Notice, 7 FCC Rcd at 2655.

25. Commission Attribution Rules in Other Services and Attribution Rules in Other Agencies. As we consider revising our broadcast attribution rules, we will take note of the attribution rules we apply in other services and the attribution rules applied by other federal agencies, to the extent that they are relevant to our purposes and goals.

26. Commission Attribution Rules in Other Services. We seek comment on the relevance of attribution rules applied in other FCC services. Many of our attribution rules, including those in most cable and in Personal Communications Services ("PCS") multiple-ownership contexts, incorporate a five percent ownership benchmark.[43] As noted above, we set a five percent voting stock attribution benchmark for broadcasters based on our finding that it identifies those ownership thresholds that enable an entity to influence or control programming or other core decisions. The other services that use a five percent benchmark may apply it differently, but they have generally relied upon this finding in so doing.[44] A critical matter we seek comment on is whether and how a change in our broadcast attribution benchmark would affect the many services that rely on it.

27. In the contexts of cable operator/broadcast network cross-ownership,[45] cable national subscriber (horizontal) limits,[46] and cable channel occupancy (vertical) limits,[47] the attribution standards are identical to those used in broadcasting.[48] Indeed, in drafting these cable attribution rules, we expressly adopted the broadcast model based on our view that the purpose of these cable attribution rules is similar to the purpose of the broadcast attribution rules: to identify those ownership thresholds that enable an entity to influence or control management or programming decisions (for broadcasters), or the programming marketplace

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[43] Unless stated otherwise, the attribution rules discussed in this section share certain characteristics: they attribute all general partnership interests, any entity that exercises actual working control, and officers and directors of the licensee. One exception to the last classification is video dialtone, in which officers and directors hold attributable interests only if they are also shareholders.

[44] See, e.g., Memorandum Opinion and Order on Reconsideration and Third Further Notice of Proposed Rulemaking in CC Docket 87-266, FCC 94-269 (released Nov. 7, 1994) ("Video Dialtone Reconsideration"), ¶ 68.

[45] 47 C.F.R. § 76.501, Note 2.

[46] 47 C.F.R. § 76.503(f).

[47] 47 C.F.R. § 76.504(h).

[48] 47 C.F.R. § 76.501, Note 2. This has also long been the standard for cable/broadcast cross-ownership.

(for the two cable concentration attribution rules).[49] Further, Congress has suggested that the diversity rationale is relevant to cable.[50] Consequently, we deemed it appropriate to apply the broadcast attribution standards to the foregoing cable contexts.

28. However, we apply different, usually more restrictive, attribution rules with respect to other cable ownership rules. For instance, in analyzing ratemaking valuation methods for a cable operator's affiliate's transactions ("cable rate valuations"), the Commission considers five percent or more of a corporation's total equity (i.e., the combination of both voting and nonvoting stock) as an attributable interest.[51] We do not apply a single majority shareholder exception. Further, we attribute all limited partnership interests of 5 percent or more, unlike the broadcast attribution rules, which do not currently apply an equity benchmark to limited partnership interests. As discussed infra, the broadcast attribution rules relieve limited partnership interests from attribution in situations where those interests satisfy insulation criteria[52] designed to ensure that the limited partner cannot influence or control the limited partnership.

29. These more restrictive attribution rules reflect the statutory goal intended to be served by these ratemaking rules: to ensure that consumers pay reasonable rates for regulated cable service.[53] In this case, then, the issue is not merely influence or control, but, rather, whether the operator-affiliate relationship is sufficient to create an incentive for cable

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[49] See Second Report and Order in MM Docket No. 92-264, 8 FCC Rcd 8565, 8581, 8591-92 (1993) ("Horizontal and Vertical Limits Second Report and Order"). Moreover, in adopting the cable attribution rules, we cited the legislative history of the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act"), which suggested that the Commission adopt the broadcast criteria for the cable horizontal and vertical integration attribution rules. We also cited Section 11(f)(2) of the 1992 Cable Act, 47 U.S.C. § 533(f)(2), which directed the Commission, in part, to consider the significant benefits of industry concentration, including economies of scale and increased capital investment in more and better original cable programming. Thus, in keeping with statutory intent, we balanced the costs of industry consolidation with its significant benefits. As a result, these particular attribution rules set a somewhat less restrictive standard than do some of our other recently enacted cable regulations.

[50] Horizontal and Vertical Limits Second Report and Order, 8 FCC Rcd at 8583-84 (citing Sen. Rep. No. 102-92, 102d Cong., 2nd Sess. at 80, reprinted in 1992 U.S.C.C.A.N. 1133, 1213).

[51] See Report and Order and Further Notice of Proposed Rulemaking in MM Dockets No. 93-215 and CS 94-28, 9 FCC Rcd 4527, 4667-68 (1994) ("Cable Rate Valuation").

[52] The insulation criteria for limited partnerships will be discussed infra.

[53] 47 U.S.C. §§ 543(b) & (c).

operators to impose the costs of nonregulated activities on regulated cable subscribers through improper cross-subsidization.[54] In adopting them, we determined that wider-ranging attribution rules were necessary for us to meet our goals. We performed a similar analysis when we adopted identical standards for cable basic service tier rates and equipment.[55]

30. We apply the same, more restrictive, attribution criteria when examining ownership in the contexts of cable cross ownership with video programmers, Multichannel Multipoint Distribution Service ("MMDS"), and Satellite Master Antenna Television Service ("SMATV"). In each case, we have sought to adopt rules that would promote diversity and competition in general. Regarding the cable/programmer proscription,[56] we found that while the broadcast standards addressed some of our concerns, the proscription had a specific additional goal: to foster the development of competition to traditional cable systems.[57] Keeping that goal in mind, we found that a relatively inclusive rule was necessary to curb the incentives of cable operators to influence the behavior of their affiliates to the detriment of competitors.[58]

31. In the context of cable cross-ownership with MMDS and SMATV, we sought to prevent cable operators from "warehousing potential competition,"[59] to encourage alternative providers of multichannel video service, and to promote the development of local competition

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[54] Cable Rate Valuation, 9 FCC Rcd at 4659, 4668. "Cross-subsidization" describes the process by which a cable operator purchases items from its unregulated affiliates for substantial sums, then passes on the artificial "cost" to consumers; or by which the cable operator charges an extremely low price to its affiliates when the undercharges can be offset by increased charges to consumers. Id. at 4664.

[55] More stringent attribution criteria include: stock interests of five percent of greater, both voting and nonvoting; limited partnerships of five percent or more, regardless of insulation; and the absence of a single majority shareholder exception. Report and Order and Further Notice of Proposed Rulemaking in MM Docket No. 92-266, 8 FCC Rcd 5631, 5788 n. 601 (1993) ("Rate Order").

[56] 47 C.F.R. §§ 76.1000-1003.

[57] First Report and Order in MM Docket 92-265, 8 FCC Rcd 3359, 3360 (1993) ("Competition and Diversity in Video Programming Distribution and Carriage"), recon. granted in part on other grounds, FCC 94-287, released December 9, 1994.

[58] Id. at 3370.

[59] Report and Order and Further Notice of Proposed Rulemaking in MM Docket No. 92-264, 8 FCC Rcd 6828, 6841 (1993) ("Cable Horizontal and Vertical Limits First Report and Order") (citing S. Rep. No. 92, 102d Cong., 1st Sess. 46 (1992), reprinted in 1992 U.S.C.C.A.N. 1133).

to established cable operators. Again, we concluded that attribution rules more stringent than the broadcast rules were necessary to achieve these goals.[60]

32. We also adopted attribution rules for video dialtone, another service designed to provide multichannel video programming, that were more restrictive than the broadcast rules. The video dialtone rules hold attributable ownership interests comprising five percent or more of a corporation's outstanding stock, whether voting or nonvoting. Further, there is no single majority shareholder exception.[61] Like the broadcast multiple ownership rules, our video dialtone rules are intended to foster competition and diversity. However, the video dialtone ownership rules are also designed to reduce the likelihood of unfair discrimination by local exchange carriers. Relying in part on this distinction, we adopted different attribution rules for video dialtone than we apply in broadcasting. We noted that a nonvoting interest in a video dialtone provider would create incentives for discrimination, thereby implicating the foregoing concerns. We made the same observation with regard to the single majority shareholder exception: a 49 percent voting stockholder in that situation would similarly raise our discrimination concerns.[62]

33. We have established other attribution rules in services that are not intended for broadcasting: narrowband and broadband PCS, cellular, and the specialized mobile radio ("SMR") service.[63] In establishing these rules, our goals have been "competitive delivery, a diverse array of services, rapid deployment, and wide-area coverage."[64] We have set the multiple-ownership attribution benchmark for broadband PCS at 5 percent of the equity, outstanding stock, or outstanding voting stock of the corporation. The rules do not distinguish among limited partners based on whether or not they meet certain insulation criteria.[65] Further, the rules have no single majority shareholder exception.[66] Narrowband

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[60] Id. at 6843, 6845.

[61] 47 C.F.R. § 63.54(e)(1).

[62] Video Dialtone Reconsideration at ¶ 69.

[63] See, e.g., 47 C.F.R. § 24.3. ("Broadcasting as defined in the Communications Act is prohibited" in the broadband PCS service.)

[64] Memorandum Opinion and Order in Gen. Docket No. 90-314, 9 FCC Rcd 4957, 4959 (1994) ("Broadband PCS Memorandum Opinion and Order").

[65] These criteria will be discussed more fully infra.

[66] 47 C.F.R. § 24.204(d)(2).

PCS service has the same 5 percent attribution benchmark as broadband PCS.[67]

34. However, for purposes of the rules restricting common ownership of PCS and cellular licenses in the same geographic service areas, we have adopted a benchmark of 20 percent of the cellular entity's total equity, voting stock, or nonvoting stock.[68] In so doing, we noted that adopting the more restrictive 5 percent benchmark would have failed to acknowledge the unique history of cellular licensing.[69] In this regard, we had earlier set a 20 percent attribution benchmark for cellular licensees, because voluntary settlements in the initial phase of the service were often resulting in significant, but noncontrolling, interests in cellular licenses being held by various entities. Therefore, we believed that subsequently enacting a stricter attribution rule for PCS (and other CMRS) ownership of a cellular entity would unfairly restrict the access of entities with noncontrolling cellular interests to the emerging mobile services market, thereby inhibiting the early development of PCS.[70]

35. We have taken a similar approach with SMR. Thus, for the purpose of the

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[67] 47 C.F.R. § 24.101. See Memorandum Opinion and Order in Gen. Docket No. 90-314 and ET Docket No. 92-100, 9 FCC Rcd 1309, 1312-13 (1994); recon. granted in part, Second Memorandum Opinion and Order, 9 FCC Rcd 4519, 4521-22 (1994). It should be noted that petitions for reconsideration are pending with respect to certain aspects of the broadband and narrowband PCS attribution rules. See, e.g., Petition for Reconsideration and Clarification, filed by The Morgan Stanley Leveraged Equity Fund II, L.P., and Morgan Stanley Capital Partners III, L.P., on September 6, 1994, with respect to Further Order on Reconsideration in GEN Docket No. 90-314, 9 FCC Rcd 4441 (1994) (Broadband PCS order adopting multiplier); Petition for Reconsideration and Clarification, filed by The Morgan Stanley Leveraged Equity Fund II, L.P., Morgan Stanley Capital Partners III, L.P., Morgan Stanley Venture Capital Fund, L.P., and Morgan Stanley Venture Capital Fund II, L.P., on October 7, 1994, with respect to Second Memorandum Opinion and Order in GEN Docket No. 90-314 and ET Docket No. 92-100, 9 FCC Rcd 4519 (1994) (Narrowband PCS).

[68] 47 C.F.R. § 24.204(d)(2)(ii). However, we have carved out exceptions to this rule in order to foster ownership by certain designated entities that have traditionally had difficulty acquiring start-up capital. Specifically, pursuant to Section 309(j) of the Communications Act, 47 U.S.C. § 309(j)(4)(D), we have adopted a 40 percent benchmark for small businesses, rural telephone companies, and businesses owned by women or members of minority groups. Broadband PCS Memorandum Opinion and Order, 9 FCC Rcd at 5007-10.

[69] Second Report and Order in Gen. Docket No. 90-314, 8 FCC Rcd 7700, 7745-46 (1993) ("Broadband PCS Second Report and Order"), on recon, Broadband PCS Memorandum Opinion and Order, 9 FCC Rcd 4957, 5002 (1994) , recon. granted in part and denied in part, Third Memorandum Opinion and Order, 59 Fed. Reg. 55372 (Nov. 7, 1994) ("Broadband PCS Third Memorandum Opinion and Order").

[70] Id.

SMR/cellular/broadband PCS spectrum aggregation limits, we have also adopted a benchmark of 20 percent of the equity, outstanding voting stock, or outstanding nonvoting stock of any of these entities.[71] By so doing, we promote a competitive environment for all players in the CMRS market.

36. We invite comment on the relevance of the foregoing attribution criteria, as well as others not discussed herein, to our consideration of the broadcast attribution rules. Does broadcasting have unique factors that make comparison with other Commission services inapposite, or, to the contrary, should we consider our action in other services as precedential? Is broadcasting sufficiently different from these other services in nature, function of the service or otherwise so as to justify any differences? Or, are the purposes of the broadcasting attribution and multiple ownership rules sufficiently distinct so as to justify any differences between those rules and those of the other Commission services?

37. Other Agency Benchmarks. In addition to taking note of the attribution rules used in other Commission services, we also seek comment as to regulatory benchmarks used by other federal agencies, including those discussed below and other standards that commenters may bring to our attention.

38. The general 10 percent attribution benchmark that was proposed in the Capital Formation Notice is employed in a number of other regulatory contexts. For example, Congress has enacted a 10 percent statutory attribution threshold to implement acreage limitations applicable to federally leased mineral rights.[72] As with the Commission's attribution standards, this statutory threshold, administered by the Department of the Interior, provides a mechanism for enforcing ownership restrictions applicable to limited publicly-owned resources.

39. In a different context, the SEC uses a 10 percent equity benchmark in its "insider" trading restrictions; in Congress' judgment, holders of more than 10 percent of a company's stock, in addition to the company's officers and directors, are in a position to make unfair use of nonpublic information regarding the company.[73]

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[71] 47 C.F.R. § 20.6(d)(2). See Third Report and Order in Gen. Docket No. 93-252, 59 Fed. Reg. 59945, 59948 (Nov. 21, 1994).

[72] One such acreage limitation, for instance, generally provides that no single entity can "take, hold, own, or control" more than 246,080 acres of land subject to federal oil or gas leases in any one state. See 30 U.S.C. § 184(d). The statute further establishes a 10 percent equity threshold for determining attribution of ownership in connection with these limitations. Id. at § 184(e).

[73] See Securities and Exchange Act § 16(b), 15 U.S.C. § 78p(b); Kern County Land Co. v. Occidental Petroleum Corp., 411 U.S. 582, 591 (1973).

40. The U.S. Department of Transportation ("DOT") employs a 10 percent benchmark in certain reporting and certification requirements applied to air carriers. An air carrier proposing a "substantial change in operations, ownership, or management" must submit certain data to DOT to allow the agency to determine whether the carrier will continue to meet its certification requirements.[74] A "substantial change in operations, ownership, or management" is, in turn, defined to include the "acquisition by a new shareholder or the accumulation by an existing shareholder of beneficial control of 10 percent or more of the outstanding voting stock in the corporation."[75] An applicant for a new certificate must also submit information regarding holders of 10 percent or more of its voting stock, including whether any such holders are officers, directors, or owners of 10 percent or more of the stock of another air carrier.[76]

41. DOT increased this reporting benchmark from 5 percent to 10 percent in a 1992 rulemaking proceeding, stating that it is "principally concerned about the effects on a carrier's fitness and U.S. citizenship stemming from the influence of those holding a substantial interest in the company...."[77] In DOT's view, ownership of 10 percent or more of voting stock "represents at least the potential for significant influence on a carrier's operations."[78] Noting that the "great majority of the carriers whose fitness the Department monitors are not large or publicly held," DOT found that "requiring carriers to report ownership interests amounting to less than 10 percent would be overly burdensome without providing a concomitant benefit for the Department's fitness purposes."[79]

42. Other federal agencies use benchmarks higher than 10 percent to trigger certain regulatory requirements. Section 7A of the Clayton Act imposes premerger notification and waiting period requirements on certain corporations planning to consummate large mergers

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[74] See 14 C.F.R. § 204.5.

[75] See 14 C.F.R. § 204.2(n)(3).

[76] See 14 C.F.R. § 204.3(g).

[77] Final Rule, 57 Fed. Reg. 38761, 38763 (August 27, 1992).

[78] Notice of Proposed Rule Making, 56 Fed. Reg. 27696, 27699 (June 17, 1991). DOT also cited as support for its 10 percent benchmark a statutory provision, which is no longer in effect, requiring regulatory approval of certain air carrier mergers. Id.; 49 U.S.C. App. § 1378. See also 49 U.S.C. App. § 1551(a)(7) (repealing provision effective January 1, 1989). This provision provided that "any person owning beneficially 10 per centum or more of the voting securities or capital, as the case may be, of an air carrier shall be presumed to be in control of such air carrier unless the [Civil Aeronautics] Board finds otherwise." Id. at § 1378(f).

[79] Final Rule, 57 Fed. Reg. at 38763.

and acquisitions.[80] These requirements are triggered when, among other things, the entity seeks to acquire 15 percent or more of a company's voting stock.[81] The purpose of these requirements "is to provide the [Federal Trade] Commission and the Department of Justice with information and time necessary to determine whether a proposed transaction, if consummated, may violate the antitrust laws."[82]

43. In addition, in comments filed in response to the Capital Formation Notice, Belo cites a financial reporting benchmark used by the Interstate Commerce Commission ("ICC") that is greater than 10 percent.[83] Under these ICC financial reporting guidelines, a railroad company must use "principles of equity accounting" in analyzing investments in voting stock of affiliated companies that give "the carrier the ability to significantly influence the operating and financial policies of an investee."[84] The ICC regulations go on to provide that an investment of 20 percent or more of the voting stock of an investee indicates such influence in the absence of evidence to the contrary.[85]

44. The strength of the analogy to other benchmarks will, of course, depend on whether the purpose of the particular benchmark in question parallels our objective in identifying ownership interests that confer on their holders the ability to influence the day-to-day operations of a licensee. Indeed, in our 1984 Attribution Order we declined to follow several of the regulatory benchmarks described above, finding that the purposes they served were inapt to the Commission's multiple ownership policies.[86] The Commission instead

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[80] 15 U.S.C. § 18a.

[81] Id. at § 18a(a)(3)(A).

[82] See FTC v. Illinois Cereal Mills, Inc., 691 F.Supp. 1131, 1138-39 (N.D. Ill. 1988), aff'd, 868 F.2d 901 (7th Cir. 1989). See also H.R. Rep. No. 94-1373, 94th Cong., 2nd Sess. at 5-8 (reprinted in 1976 U.S.C.C.A.N. 2637).

[83] See Belo Comments at 11.

[84] See 49 C.F.R. § 1201.5-2(b)(1).

[85] Id.

[86] For example, with respect to the SEC's 10 percent "insider trading" benchmark and the Department of Transportation's air carrier regulations existing at the time, we stated in the Attribution Order, 97 FCC 2d at 1010, that the:

> unifying characteristic of these rules is that they are intended to prevent intrinsically illegal or undesirable activities [such as collusive or anticompetitive behavior.] The levels of stock ownership which these rules variously identify as carrying an appreciable risk of permitting such activities

relied on what it found to be an especially analogous benchmark used for certain SEC reporting requirements; under these requirements, holders of 5 percent or more of the stock of a large, publicly-traded corporation must disclose certain information concerning the nature of their stock ownership.[87] We stated our belief that, as with our attribution rules, the SEC's 5 percent benchmark was "directed to identifying interests with the potential for significant influence or control."[88]

45. While we are not bound to follow another agency's ownership benchmarks, such benchmarks reflect Congressional or administrative judgments in a variety of contexts as to the correlation between different levels of ownership and the ability to influence or control an entity. Commenters should address, in detail, why a particular agency's benchmark may or may not be applicable, by analogy, to our analysis. We are particularly interested in whether the purposes underlying other regulatory benchmarks are comparable to our competition and diversity concerns, and why that agency believed the percentage it selected reflects a substantial enough interest to constitute the level of influence or control that implicates its underlying ownership limitation, and, in particular, whether its analytical methodology would be applicable to our rules.

46. We seek comment on how to devise rules that are consistent with the administrative concerns expressed in our section devoted to our underlying principles, see paragraphs 12 through 16, supra, and that would accommodate the principles reviewed in paragraph 17 supra. Should there be an exemption, similar to the single majority stockholder exemption, for stockholders in firms where management holds some threshold level of stock. on the ground that the inherent control afforded managers would preclude significant influence by other stockholders?[89] Can our stockholding benchmarks rely on, or take

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seem inappropriate models where, as here, the activity at issue -- influencing a licensee's programming decisions -- is not only legal but expected behavior by one with a legitimate investment interest in the licensee corporation.

[87] See Securities and Exchange Act § 13(d), 15 U.S.C. § 78m(d).

[88] Attribution Order, 97 FCC 2d at 1006-07.

[89] The influence of ownership of voting rights (who holds them and how many) and board composition on managerial and corporate performance is the subject of numerous studies on the "market for corporate control." See J. Weston, et al., Mergers, Restructuring and Corporate Control (1990) for a survey of this literature. Based on the data examined in these studies, it appears, first, that the composition of the board is an important determinant of control. Boards with more "outside" directors will likely behave differently than those with more "inside" directors. Second, the distribution of voting rights and who holds them is another factor in determining corporate control. Firms in which voting rights are concentrated in the hands of management will likely behave differently than those in which voting rights among shareholders are concentrated in an outside party (i.e., non-manager)

cognizance of, the size of a stockholding relative to others in the firm? For instance, should we amend our attribution benchmark to consider whether a stockholder is, or is not, one of the larger or largest stockholders in a firm in determining attribution? We are initially concerned about the practicability of such a standard, however apt, as it appears to introduce uncertainty into the attribution framework. Under such a rule, whether a particular stockholder's ownership interest is attributed may change as a result not only of his own purchases and sales but also as a result of such transactions by others that are beyond his control. The best course of action may therefore be to retain our longstanding approach of basing our attribution benchmark on our best possible estimate of what level of stockholding is likely to be influential, balanced by our intent to avoid attributing interests that provide only a minimal risk of influence in order to encourage capital investment in broadcasting.

B. Voting Stock: Passive Investors

47. In the Attribution Order, we adopted a 10 percent attribution benchmark for certain institutional investors (bank trust departments, insurance companies, and mutual funds) that we deemed to be "passive" in nature in order to "increase the investment flexibility of these entities and, in so doing, expand the availability of capital to the broadcast and cable industries without significant risk of attribution errors."[90] We noted that these passive institutional investors generally invest funds on behalf of others, play passive investment roles, and are generally prohibited either by law or by fiduciary duties from becoming involved in the operation or control of the companies in which they invest.[91] To ensure that these institutional investors maintain a truly passive role in the affairs of the licensee, we require them to refrain from contact or communication with the licensee on any matters pertaining to the operation of its stations, and we prohibit such investors or their representatives from acting either as officers or directors of the licensee corporation.[92] Despite these considerations, in 1984, we declined to raise the passive investor attribution level above 10 percent. At that time, we were concerned that merely voting or trading such large blocks of stock might affect the management of a company, even if such results were inadvertent or unintended.[93]

Additionally, the statistical distribution of voting rights across shareholders influences the threshold at which the management or outside party holdings begin to control the firm.

[90] Attribution Order, 97 FCC 2d at 1013.

[91] Attribution Order, 97 FCC 2d at 1012-13.

[92] Attribution Order, 97 FCC 2d at 1013-14. Moreover, as an additional safeguard, each licensee is required to certify that no such investor has exerted or attempted to exert any influence or control over any of the affairs of the licensee. Id. at 1014; FCC Form 323 ("Ownership Report"), Instruction 6.

[93] Attribution Order, 97 FCC 2d at 1013.

48. In the Capital Formation Notice, we proposed increasing the passive investor benchmark from 10 percent to 20 percent.[94] The commenters who addressed this issue unanimously supported increasing the voting stock attribution level for passive investors.[95] The Investment Company Institute ("ICI") and most other commenters, for example, argued that in the case of passive investors, there is little cause for concern regarding the possible exertion of undue influence over licensees since such entities are passive by nature and are solely concerned with investing in companies, not controlling them. We are not, however, comfortable raising the benchmark based on the record thus far. We invite commenters to delineate what specific assurances we would have that passive investors that hold large stock interests cannot or would not exert influence or control over broadcast licensees and that raising the benchmark would therefore not exclude from attribution holders of interests that have a significant and realistic potential to influence station operations. Are there common factors, intrinsic to all passive investors, or institutional or other safeguards that could provide such assurance? Moreover, the comments do not, in our view, dispose of the concern we have raised regarding the impact on corporate decision-making that could result, even unintentionally, by the trading and voting of large blocks of stock by assertedly passive investors. We invite commenters to address the foundations of the Commission's concern about the possible effect of large stock trades and whether there have, in fact, been any stock transactions of this nature. If so, how substantial have such stock transactions been, and do the costs of the exclusion of such interests from attribution outweigh any potential benefits that might be realized from an increased attribution benchmark?

49. Additionally, while commenters argued that a higher attribution level for passive investors would significantly increase equity investment in the broadcast industry and would increase the availability of capital by giving passive investors greater flexibility with respect to broadcast investments, we seek additional comments on the degree of increased investment that would likely stem from any adjustment of our rules and on the need for such increased investment. Most commenters favoring increasing attribution levels, for example, contended that passive investment in broadcast entities is limited more by the Commission's attribution rules than by the financial resources available to such investors.[96] However, we would like

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[94] Capital Formation Notice, 7 FCC Rcd at 2655.

[95] See Comments of CC Capital Corporation, a MESBIC ("CC"), National Association of Black Broadcasters ("NABOB"), National Association of Investment Companies ("NAIC"); Minority Broadcast Investment Corporation ("MBIC"), Santarelli, Smith & Carroccio, a law firm ("Santarelli"), Belo, NAB, Great American, ICI and CIBC.

[96] In this regard, we note that Great American stated that under our current attribution rules, increased broadcast investment triggers "burdensome" new FCC reporting obligations for additional attributable interests held strictly for investment. There is no further explanation as to why this alleged burden is significantly or directly responsible for any lack of investment in broadcast properties. Parties may wish to provide more information in this regard. Moreover, we emphasize that any increase in the current attribution levels, which

commenters to discuss in greater detail whether they think our present rules inhibit investment, and how modifications of our rules might encourage further investment.[97] Additionally, the commenting parties did not adequately address our concerns that any increase in these attribution levels not implicate our concerns about the potential for influence. We request additional empirical and other data, where appropriate, on the above issues. In commenting on the appropriate benchmark for passive investors, parties should continue to bear in mind the points and concerns raised in our section delineating our underlying principles. Finally, if the benchmark for all investors is raised to 10 percent, does that reduce any need there might be to facilitate broadcast investment by increasing the passive investor benchmark?

50. Several commenters raised a closely related issue not discussed in our Capital Formation Notice. They requested us to further expand the passive investor class to include other institutional investors, such as pension funds, investment and commercial banks, and certain investment advisors. Commenters indicated that such institutions invest solely for income and are not interested in influencing or controlling the management of the companies in which they invest.[98] We do not intend to revisit our decision of 1984 in order to broaden

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would result in expanding the class and nature of nonattributable interests, may require more reliance on disclosure to the FCC of such interests so that we have adequate information to be assured that our rules and policies are being met. We therefore ask parties to address with specificity the safeguards that will be necessary to ensure compliance with our rules without placing unreasonable or unnecessary burdens that may in fact impair further broadcast investment.

[97] For example, Great American stated that one of its passive institutional investors would make additional investments in other broadcast entities but for the restrictions placed by the current attribution rules. This, however, is too anecdotal and isolated to provide adequate guidance as to whether raising the benchmarks will result in a more across-the-board increase in the potential capital that might be made available to other broadcast entities. Moreover, CIBC, although supporting an increase in the attribution levels, did not believe that it is the current rules that are responsible for undercapitalization of the industry as much as the fact that such investments are unattractive because of such factors as the volatile nature of broadcast revenues, both across and within individual markets; the rise of alternative advertiser-supported media such as cable; and that many markets have too many media outlets to support existing broadcast outlets. Neither of these commenters, however, provided that type of detailed and specific data to enable us to assess how specific modification of the current attribution standards will directly result in increased broadcast investment. We invite comment on what specific attribution rules or other factors may be inhibiting broadcast investment and what specific rule changes might reverse any such problem.

[98] See Comments of Great American at 2; Reply Comments of CIBC at 3.

the category of passive investors to include such entities.[99] However, we invite commenters to explain why this tentative conclusion is incorrect. Similarly, we are not prepared to expand the category of passive investors to include Small Business Investment Companies ("SBICs") and Specialized Small Business Investment Companies ("SSBICs"), formerly known as Minority Enterprise Small Business Investment Companies ("MESBICs"), as we proposed in the Capital Formation Notice. In the Capital Formation Notice, we reiterated our conclusion in the Attribution Order that these entities are not entirely passive in nature.[100] Under certain circumstances, these entities are authorized to exercise control over debtor companies for temporary periods.[101] We have received no evidence in the comments made thus far to alter our first conclusion that these entities do not meet our definition of "passive." In another proceeding initiated today, in MM Docket Nos. 94-149 and 91-140, we are, however, considering other rule changes to facilitate capital investment and entry by minorities and women without broadening our definition of "passive" investors.[102]

C. Minority Stockholdings in Corporations with a Single Majority Shareholder

51. Minority voting stock interests held in a corporate licensee are not attributable if there is a single majority shareholder of more than 50 percent of the corporate licensee's outstanding voting stock.[103] In adopting this rule in 1984, the Commission reasoned that in this situation minority interest holders, even acting collaboratively, would be unable to direct

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[99] The Commission declined to afford passive status to investment advisors because: (1) such status is unnecessary where an investment advisor does not have the power to vote the stock it holds or direct its disposition because it is then treated as any other custodial holder, that is, ownership is not attributed to it; and (2) where an investment advisor votes the stock, the Commission was not convinced that such advisors were passive in nature. It also noted that it would consider waiver requests from investment advisors seeking nonattribution of their interests. With respect to pension funds, the Commission also declined to afford passive status, finding that pension funds are not so consistently passive as to warrant relaxed benchmark treatment under the attribution rules, and noting evidence that pension funds were increasingly managing their own investments and actively pursuing social goals in their investment policies. Attribution Order, 97 FCC 2d at 1014-16 & n. 44. Further, while the Commission did not specifically mention investment and commercial banks, we have not been provided sufficient information here to conclude that such entities are truly passive in nature.

[100] 7 FCC Rcd at 2656.

[101] Attribution Order, 97 FCC 2d at 1016 & n. 45.

[102] See Notice of Proposed Rule Making in MM Docket Nos. 94-149 and 91-140, FCC 94-323 (adopted Dec. 15, 1994).

[103] 47 C.F.R. § 73.3555, Note 2(b).

the affairs or activities of the licensee on the basis of their shareholdings.[104] We invite comment as to whether we should restrict the availability of this exemption. As discussed above, we are concerned that this exemption not be used to evade the multiple ownership limits. We are concerned that our prior conclusion that a minority stockholder could not exert significant influence on a licensee where there is a single majority stockholder may not be a valid conclusion in all circumstances. For example, we can conceive of circumstances in which the minority voting stockholder has contributed a significant proportion of the equity, holds 49 percent of the voting stock, and combines that holding with a large proportion of the nonvoting shares or debt financing. In such a circumstance, would that minority shareholder have the potential to influence the licensee such that the multiple ownership rules would be implicated? We invite comment on how we should approach our concerns in this area. Should we restrict the availability of the exemption? If so, should we do so on a case-by-case basis or restrict it in specified circumstances? If we should do so in specified circumstances, under what circumstances should we restrict the availability of the exemption?

D. Non-Voting Stock

52. Under our attribution rules, all non-voting stock interests (including most preferred stock classes) are generally nonattributable.[105] Non-voting stock provides significant benefits as an investment/capitalization mechanism; it specifically precludes the direct means (i.e., by voting) to influence or control the activities of a corporate licensee, but allows investors to acquire sufficient equity to compensate for their risk. Moreover, non-voting stock which is convertible to voting stock is not considered to be a cognizable interest until such time as the conversion right is exercised. If the contingency upon which the conversion right rests is beyond the control of the stockholder, we determined that attribution is not appropriate because the shareholder has no apparent ability to control or influence the licensee corporation. However, even if the conversion right is within the shareholder's ability to effectuate, until the shareholder actually acquires the power to vote, the current rules presume that he should not be able to exercise impermissible influence or control over a licensee.[106]

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[104] Attribution Order, 97 FCC 2d at 1008-09.

[105] See 47 C.F.R. § 73.3555, Note 2(f).

[106] Attribution Order, 97 FCC 2d at 1020-21. In this regard, the Commission observed that a "threat" to convert stock in order to vote on a corporate licensee's affairs would be an "empty gesture" if such conversion would result in the stockholder violating the multiple ownership rules, and, if no violation would result, reliance upon convertible non-voting stock to exert influence would not contravene the purpose of the multiple ownership rules. Additionally, under the current rules, the power to compel dividends or financial distribution attached to a non-voting interest is not viewed as conferring the power to influence or control a licensee in a manner contemplated by the multiple ownership rules, and therefore such

53. We invite comment on whether we should amend our attribution rules to consider nonvoting shares as attributable, at least in certain circumstances. We are concerned, for example, that a nonvoting shareholder who has contributed a large part or all of the equity of a corporate licensee may carry appreciable influence that is not now attributed. While such a shareholder could not vote formally on issues, it may deny reality to presume that such a shareholder would not seek the means to potentially influence the operations of the licensee to protect his investment and limit his risk. Since we are not aware of the identity of such shareholders, and licensees are not currently required to file with us all agreements with such shareholders that might affect the operations of the licensee,[107] we are concerned that there may be a gap in this area. We invite comment as to these issues.

54. If we decide to attribute nonvoting shares, should we do so only, as discussed below, where substantial equity holdings are held in combination with other rights, such as some voting shares or contractual relationships? If we decide to attribute nonvoting shares without reference to the existence of other contractual relationships, should we adopt a separate benchmark at the same level as we apply either to voting shares or to "passive" investors? We tentatively believe that we should, if we decide to attribute nonvoting shares, adopt a benchmark at least as high as that applied to "passive investors" since there is a common assumption of less potential for influence or control in both instances. Alternatively, should we establish a separate benchmark for nonvoting shares? If we establish a distinct benchmark for nonvoting shares, what should that benchmark be? While we are not inclined to proceed on a case-by-case basis, because of the administrative burdens imposed by such an approach, would those burdens be outweighed by other factors? We invite information on and analysis of the treatment of nonvoting shareholders in other attribution rules we administer and whether these rules are relevant in the broadcast multiple ownership context.[108]

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powers will not change the noncognizable nature of such non-voting interests. Id.

[107] See 47 C.F.R. § 73.3613 (describing the contracts that must be filed by licensees). One way to address this concern is by amending our reporting requirements to include all shareholder agreements, at least as an interim measure, and we invite comment on such an approach.

[108] We attribute nonvoting stock in different ways in other services, depending on the particular context. In all the cases discussed below, unless expressly noted, we use a five percent benchmark. As discussed more fully in the text, supra, we consider a corporation's total equity to determine whether certain entities are affiliates of cable operators in the cable ratemaking context and to determine cable cross ownership with video programmers, MMDS, and SMATV. In video dialtone cross-ownership between the carrier and the video programmer, we also look at the overall ownership interest in a corporation's outstanding stock, whether voting or nonvoting. In the context of the broadband and narrowband PCS multiple ownership rule, our benchmark is based on the equity, outstanding stock, or outstanding voting stock. We use a 20 percent benchmark in the context of the

VI. Partnership Interests

55. We generally attribute all partnership interests, except for sufficiently insulated limited partnership interests, regardless of the degree of equity holding, because we determined that the power and responsibility of partners to collectively or individually conduct the affairs of the partnership was a significant enough relationship to attribute ownership.[109] There is no apparent controversy regarding our rule to attribute all general partnership interests, and we do not intend to revisit that rule. We currently exempt from attribution those limited partners that are sufficiently insulated from "material involvement," directly or indirectly, in the management or operation of the partnership's media related activities, upon a certification by the licensee that the limited partners comply with specified insulation criteria.[110] Limited partnership interests that are not insulated are attributable regardless of the amount of equity held. We seek comment on the effectiveness of our current insulation criteria for limited partnership interests. Are additional insulation criteria necessary to assure that the goals of the attribution rules are achieved? Or, to the contrary, should the insulation criteria be relaxed to any degree, at least in certain circumstances, to attract increased capital investment or encourage new entry, and can this be done without implicating the purposes of the multiple ownership rules to encourage diversity and

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SMR/cellular/broadband PCS spectrum aggregation limits, also based on the equity, outstanding voting stock, or outstanding nonvoting stock of any of these entities.

[109] Attribution Order, 97 FCC 2d at 1022-23.

[110] These "insulation criteria" include the following: (1) The limited partner cannot act as an employee of the partnership if his or her functions, directly or indirectly, relate to the media enterprises of the company; (2) The limited partner may not serve, in any material capacity, as an independent contractor or agent with respect to the partnership's media enterprises; (3) The limited partner may not communicate with the licensee or general partners on matters pertaining to the day-to-day operations of its business; (4) The rights of the limited partner to vote on the admission of additional general partners must be subject to the power of the general partner to veto any such admissions; (5) The limited partner may not vote to remove a general partner except where the general partner is subject to bankruptcy proceedings, is adjudicated incompetent by a court of competent jurisdiction or is removed for cause as determined by a neutral arbiter; (6) The limited partner may not perform any services for the partnership materially relating to its media activities, except that a limited partner may make loans to or act as a surety for the business; and (7) The limited partner may not become actively involved in the management or operation of the media businesses of the partnership. See Attribution Reconsideration, 58 RR 2d at 618-20, on recon., 1 FCC Rcd at 802-03. Further, pursuant to 47 C.F.R. § 73.3555, Note 2(g)(2), "[i]rrespective of the terms of the certificate of limited partnership or partnership agreement, however, no such certificate shall be made if the individual or entity making the certification has actual knowledge of any material involvement of the limited partners in the management or operation of the media-related businesses of the partnership."

competition? If relaxation is justified, in what ways should the insulation criteria be relaxed?

56. Business Development Companies and Other Widely-Held Limited Partnerships. In the Capital Formation Notice, we proposed to relax insulation criteria with respect to business development companies organized as limited partnerships.[111] Because these limited partnerships contain features that may conflict with our insulation criteria, based on federal and state securities regulatory requirements, our current rules may inhibit their use. Most importantly, under both federal and state regulatory schemes, limited partners in business development companies must be afforded the right to vote on the election and removal of general partners. The Commission's insulation criteria, in contrast, require the absence of such rights (in conjunction with other insulation criteria) to support a presumption that the limited partners are sufficiently insulated from material involvement of the media-related activities of the partnership.[112] We therefore requested comment on whether we should relax the insulation criteria applicable to these widely-held limited partnerships so as to eliminate, as much as possible, the current conflict with state and federal securities laws.[113] Alternatively, we asked whether we should combine an equity ownership standard specific to these partnerships with a more limited relaxation of specific insulation requirements.

57. In the Capital Formation Notice, we also asked for comments on whether we should modify the insulation criteria applicable to all "widely-held" limited partnerships to recognize insulation where limited partners hold an insignificant percentage of the total interests in the partnership. We asked whether a 5 percent or other ownership benchmark would be appropriate in certain circumstances.

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[111] Business development companies are a special class of business investment vehicle organized for the purpose of providing transitional and intermediate financing, as well as management assistance, to small and medium-sized companies. These investments are restricted to ensure that such investment companies provide capital to developing or financially troubled companies. Such companies are structured as limited partnerships to take advantage of favorable tax treatment accorded them by the Internal Revenue Service, are regulated under the Investment Company Act of 1940, 15 U.S.C. §§ 80a-1 et seq., and are also subject to the securities laws of each state in which such partnership interests are offered or sold. See Capital Formation Notice, 7 FCC Rcd at 2656-57.

[112] See Capital Formation Notice, 7 FCC Rcd at 2656-57.

[113] The Capital Formation Notice referenced, and sought comment on, two petitions, one filed by Kagan Media Partners and the other filed by Equitable Capital Management Corporation, seeking declaratory rulings on the provisions of certain limited partnership agreements which admittedly do not comply with the current insulation criteria, but which, according to the petitioners, sufficiently insulate the limited partners from any material involvement in the partnerships' media holdings such that those interests should nevertheless be deemed nonattributable. 7 FCC Rcd at 2656. Comments received on the issues raised by the petitions are summarized infra.

58. We have received comments on the issues raised in the Capital Formation Notice. Several parties filed comments in favor of a modification of the Commission's insulation criteria with respect to widely-held limited partnerships and business development companies organized as widely-held limited partnerships to make Commission policy consistent with state and federal securities laws applicable to such entities by allowing limited partners to elect or remove general partners. They argued that allowing these specific voting rights will not result in limited partners of these entities becoming materially involved in the affairs of the partnership in light of the facts that: (1) the Commission would retain other existing insulation criteria which restrict the ability of limited partners to become materially involved in the operations of the partnership's media investments; and (2) the widely-held nature of the limited partnerships involved make it almost impossible that the limited partners could use their voting rights to exercise control over the general partners.

59. These commenters generally believed that widely-held limited partnerships possess characteristics that distinguish them from other investment vehicles and will ensure that limited partners will not be materially involved in station operations. Thus, they believe that widely-held limited partnerships should be subject to a distinct benchmark, or, in the alternative, should be completely exempt from attribution.[114] They also argued that the insulation criteria should be amended for all limited partnerships, regardless of size, to allow non-insulated limited partners (without regard to whether the partnership is widely-held) to hold equity interests below 20 percent without attribution. In this regard, Prudential Insurance Company of America ("Prudential")[115] noted that, although business development companies and widely-held limited partnerships are relatively new forms of investment vehicles, the choice of business organization -- corporation or partnership -- is determined based on tax considerations, not on the degree of participation or influence sought to be acquired. Thus, Prudential claims that either organizational form can be constructed to incorporate the desired level of influence. Prudential further maintained that there is no material difference in the participation and/or voting power of a 20 percent limited partnership interest and a 20 percent voting stock interest, and that this is true whether or not the partnership interest or the stock is in a widely-held or closely-held organization.[116]

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[114] Some commenters did not believe that there is any reason for distinguishing business development companies organized as limited partnerships from other widely-held limited partnerships for purposes of applying the insulation criteria. They maintained that nothing inherent in the regulation of a business development company results in its limited partners being further insulated from material involvement in the affairs of the partnership than limited partners in other widely-held limited partnerships.

[115] Prudential Comments at 11-12.

[116] Prudential Comments at 12. In addition, Belo stated that the typical individual investment interest held in widely-held limited partnerships is typically less than 1 percent of total equity. Moreover, unlike the structure of a conventional corporation, Belo stated that widely-held limited partnerships generally do not require annual meetings and limit limited

60. We seek additional comments in this area. In particular, we would like updated information and additional empirical information on the growth and prevalence of business development companies and widely-held limited partnerships as investment vehicles generally, as well as applied to the broadcast industry in particular, including the percentage of equity typically represented by their investment. In this regard, it will be helpful for commenters to discuss with specificity the operation of business development corporations and widely-held limited partnerships and whether the existing insulation criteria have hindered capital flow from these entities to licensees. We note, however, that we do not intend to revisit our previous decision to attribute all general partnership interests without reference to an ownership benchmark.[117]

61. We ask parties to address the standards that could be used to define widely-held limited partnerships eligible for application of any revised insulation criteria. We specifically seek comment on whether there is anything inherent in the nature of state or federal regulation of business development companies that would insure that they remain widely held and whether such a guarantee, if it exists, is an adequate substitute for any of our current insulation criteria. Parties may also wish to offer additional suggestions for defining widely-held limited partnerships that reflect our concerns that such entities be used exclusively for investment purposes.

62. We also seek additional information, supported by empirical data, on whether we should revise our decision, on reconsideration of the Attribution Order, not to adopt an equity benchmark for noninsulated limited partnerships. In that decision we determined that an equity benchmark should not apply to limited partnerships because, among other reasons, the powers of a limited partner are not necessarily dependent upon the extent of his or her equity holdings. Further, the partners in a limited partnership largely have the power themselves to determine the rights of the general partners, and these may therefore vary in terms of whether they may participate in partnership affairs. Based on these factors, the Commission decided to apply insulation criteria to limited partnerships, instead of applying an equity benchmark.[118] We are not inclined to change this approach based on the record compiled thus far. If parties disagree with this conclusion, they must provide us with more data and analysis to demonstrate that our earlier decision is no longer valid or effective.

63. In this respect, we seek information on the financial and legal structures of limited partnerships to enable us to determine whether there is a uniform equity level below

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partners to the election or removal of general partners (subject to the requirements of particular state or federal laws). Thus, it believed that these structural considerations limit the ability of limited partners, either individually or collectively, to exert influence or control over the affairs of the limited partnership. Belo Comments at 16-27.

[117] Attribution Order, 97 FCC 2d at 1022.

[118] Attribution Further Reconsideration, 1 FCC Rcd at 803-04.

which we need not be as concerned or need not be concerned at all with the application of the insulation criteria. In this regard, should equity interests be attributable in a manner similar to the benchmarks applicable to general voting stock interests -- for example, equity interests below a certain percentage of the total equity would be nonattributable, and those above a certain percentage creating a presumption of attribution -- subject to a noninvolvement certification? Should equity share be defined by the amount of cash contribution, the share of proceeds, or rights on dissolution? If the first, how do we evaluate contributions in the form of services? If the power of a limited partner is not related to his proportional partnership share (which is the premise of the current rules), is there a partnership size that would obviate the power of any one partner, such that ownership should not be attributed to any partner, regardless of his/her share? We also ask whether other state and federal regulations might provide guidance in this area, and/or the extent that such regulations might provide sufficient protections so as to make additional Commission regulations redundant. In this regard, we request estimates, supported by economic or other studies that provide their basis, of how much additional capital might be made more readily or cheaply available to the broadcast industry by adoption of any of these approaches, as well as how such capital is likely to be distributed.

VII. **Limited Liability Companies and Other New Business Forms**

64. In this proceeding we also seek comment as to how we should treat, for attribution purposes, the equity interest of a member in a limited liability company or LLC, a relatively new form of business association permitted and regulated by statute in at least 45 states.[119] LLCs are, in general, unincorporated associations that possess attributes both of corporations and partnerships. We have recently received TV and radio assignment applications where parties have argued that we should exempt certain owners of an LLC from attribution, either because they should be treated as nonvoting shareholders or because they should be treated as fully-insulated limited partners. So that we do not indefinitely delay processing of pending applications, we plan to process them on a case-by-case basis until this rule making is completed, using the tentative proposal delineated in paragraph 69 infra as our interim policy, including the special exception for minorities discussed therein.

65. These requests raise important questions as to the application of our attribution rules, and we invite comment as to how we should treat LLCs, and other new business

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[119] For a discussion of LLCs, see Brian L. Schorr, "Limited Liability Companies: Considerations in Choosing a Business Entity," Forming and Using Limited Liability Companies and Limited Liability Partnerships 1994, 836 Practicing Law Institute/Corp. 171 (1994); Marybeth Bosko, "The Best of Both Worlds: The Limited Liability Company," 54 Ohio St. L.J. 175 (1993); Robert R. Keatinge, et al., "The Limited Liability Company: A Study of the Emerging Entity," 47 Bus. Law. 375 (1992); Nicholas G. Karambelas, "Shaping the Limited Liability Company, The District of Columbia Limited Liability Company Act of 1994," The Washington Lawyer, Nov.-Dec. 1994 at 38.

forms, such as Registered Limited Liability Partnerships ("RLLPs"),[120] as well as any other new business forms, that may arise in the future for attribution purposes. Any approach we take with respect to LLCs and similar hybrid entities must ensure that exemption from attribution is granted only where there are sufficient assurances that the exempted owner is adequately insulated from control of the entity. In addressing the attribution of LLCs, we hope to delineate the principles to be applied and express them in general terms that we can apply to new business forms that appear in the future. We invite comment as to the form and content of any general principles that may be distilled from our analysis of attribution for LLCs.

66. The specific attributes of LLCs may vary, since their form is regulated by state statutes,[121] and there is, as yet, no uniform state LLC statute. LLCs are, however, generally intended to afford limited liability[122] to members, similar to that afforded by the corporate structure, while also affording the management flexibility and flow-through tax advantages of a partnership, without many of the organizational restrictions placed on corporations or limited partnerships.[123]

67. Of greatest significance with respect to our attribution rules is the fact that, depending on the requirements of the applicable state statute, LLCs generally afford their members broad flexibility in organizing the management structure and permit members to

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[120] Some states have enacted statutes permitting partnerships to elect to become RLLPs. RLLPs afford the benefits of a partnership, while permitting a mid-level of liability protection, unlike LLCs, which provide full limited liability protection. RLLP statutes generally require each partner to bear the consequences of his own negligent or wrongful acts, while insulating the partner from individual liability for the negligent or wrongful acts of other partners or partnership representatives not under the protected partner's supervision or control, unless the protected partner was directly involved in the act, or had notice and failed to take reasonable steps to prevent or cure the act. For a discussion of RLLPs, see Schorr, supra note 119.

[121] LLCs are formed by filing articles of organization with the state. See Bosko, supra note 119, at 184-85.

[122] Limited liability means that the owners of a business entity are not personally liable for the debts of the business. See Larry E. Ribstein, Business Associations § 1.02[C][3] (1990).

[123] Unlike a limited partnership, which must have at least one general partner who has unlimited liability, all the members of an LLC may have limited liability. Additionally, a limited partner may lose limited liability protection if he participates actively in the management of the partnership. By contrast, members of an LLC may maintain limited liability while actively participating in the management of the LLC. See Bosko, supra note 119, at 193-95; Schorr, supra note 119.

actively participate in the management of the entity without losing limited liability. Thus, with some variation depending on the applicable statute, LLCs may be organized with centralized management authority residing in one or a few members, or delegated to a nonmember, or, alternatively, all members may share management authority.[124]

68. Since the LLC is a relatively new business form, we have not had the occasion before the recently filed applications to rule on the issue of how we should treat LLCs under our attribution rules, i.e., to what degree and under what circumstances we should treat participation as a member of an LLC as a cognizable interest subject to the multiple ownership limits. We have also not had the occasion to rule on RLLPs. Accordingly, we invite comment as to what attribution criteria we should apply to LLCs and RLLPs. We also invite comment as to the advantages of LLCs, in general, and also, in particular, the impact on minority and female ownership opportunities.

69. We tentatively propose to treat LLCs and RLLPs as we now treat limited partnerships. Membership in an LLC or RLLP would be treated as a cognizable interest for multiple ownership purposes unless the applicant certifies that the member is not materially involved, directly or indirectly, in the management or operation of the media-related activities of the LLC or RLLP. We propose that such certification should be based on the criteria specified in our Attribution Reconsideration and Attribution Further Reconsideration.[125] We note, however, that applying limited partnership attribution criteria to LLCs would result in attributing all investors that may provide programming or other services to the LLC. In this regard, our recent experience suggests that such arrangements have been central to proposals that might significantly advance minority ownership of broadcast facilities. Accordingly, we seek comment on whether we should provide an exception to our tentative proposal, on a case-by-case basis, where doing so would advance our policy of enhancing opportunities for broadcast station ownership by minorities.

70. With respect to our tentative proposal to treat LLCs as we now treat limited partnerships, we invite comment on whether the insulating criteria developed with respect to

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[124] The LLC statutes of various states may have differing requirements for management of the LLC. Most LLC statutes provide for decentralized management (management by members) as a default provision but allow management by managers if provided for in the articles of organization or operating agreement. See Ribstein & Keatinge on Limited Liability Companies § 8.02 (1993). Since LLCs have the corporate attribute of limited liability, in order to avoid two-tiered corporate tax treatment, LLCs must avoid at least two of the other three characteristics that distinguish corporations and partnerships for tax purposes--continuity of life, centralized management, and free transferability of ownership interests. See Keatinge, supra note 119 at 385.

[125] The insulation criteria required to be contained in the limited partnership agreement are discussed in note 110 supra.

limited partnerships are sufficient to insulate members of LLCs and RLLPs or whether other criteria would be more effective. We propose to adapt the criteria to conform to the specific LLC or RLLP organizational forms without changing any underlying substantive requirements, and we invite comment as to how we should do so.

71. We are not inclined to treat LLCs as we currently treat corporations, exempting from attribution the interests of "nonvoting" shareholders without regard to the presence or absence of insulating provisions in an operating agreement.[126] This interim view reflects both our relative lack of experience with this new business form and also our concern that there are no requirements intrinsic to this business form to require members to be uninvolved in the management of the business, absent insulation provisions agreed to by them. If, however, commenters raise significant policy reasons why we should alter this interim view, we will consider those reasons. We also invite comment as to what approaches we should take to LLCs and RLLPs should we neither adopt the equity benchmark for partnerships nor retain the existing attribution standards. We also request comment on whether there are differences between LLCs and/or RLLPs and limited partnerships such that we should not treat the former entities as we treat limited partnerships.

72. We invite comment on whether, if we adopt the certification approach with respect to LLCs, we should also require parties to file copies of the organizational filings and/or operating agreements with the Commission when an application is filed. If so, what, if any, confidentiality concerns exist, and how should they be addressed? Our justification for any such possible filing requirement is that there is no uniform LLC statute, and the organizational variation among such entities may be broad. Alternatively, we could retain the discretion to require such a filing on a case-by-case basis, where we find it warranted.

73. If we adopt, as our attribution standard, an ownership benchmark applicable to limited partnerships, as discussed above, we invite comment on whether it would be appropriate to apply that benchmark to LLCs and RLLPs as well.

74. We seek comment on the following questions based on our proposed treatment of LLCs and RLLPs and we invite commenters to suggest alternative proposals. If we relax insulation standards for widely-held limited partnerships, as proposed in the Capital Formation Notice and discussed above, should we apply these changes to LLCs and RLLPs? We invite comment as to whether we should take a uniform approach to widely-held LLCs, RLLPs, and "business development companies." Do these entities have similarities in organization and/or function that would mandate such similar treatment or are there significant distinctions? Alternatively, do the policy goals discussed in the Capital Formation Notice apply with respect to LLCs and RLLPs so as to justify such a similar approach? If a uniform approach is warranted, what should that approach be?

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[126] See 47 C.F.R. 73.3555, Note 2(f).

75. Should we treat all LLCs the same or differentiate those with centralized management from those with decentralized management? In LLCs where all management authority has been vested in nonmembers who are selected by the members, should the managers be treated, for attribution purposes, as equivalent to officers and/or directors of a corporation? Should we adopt an approach of exempting from attribution members with limited equity interests, regardless of lack of compliance with insulating criteria? For attribution purposes, should the percentage of "ownership" be determined by voting rights among the members, the share divisions designated by the parties, the extent of capital contribution, or by some other measure? Under our current attribution rules, we do not distinguish among partners based on the amount of equity they contribute or their share division. If the determination is made based on capital contribution, what should be done about members whose contribution is in services? How should we treat LLCs in multi-tiered vertical organizational chains? Should multipliers be applied, and, if so, under what circumstances?

VIII. The Cross-Interest Policy and Multiple Business Interrelationships

76. We also incorporate in this proceeding the pending issues raised in the Further Notice of Inquiry/Notice of Proposed Rule Making in MM Docket No. 87-154 ("Cross-Interest Notice")[127] with respect to existing aspects of the Commission's cross-interest policy. That policy prevents individuals from having "meaningful" interests in two broadcast stations, or a daily newspaper and a broadcast station, or a television station and a cable television system, when both outlets serve "substantially the same area."[128] We also seek comment regarding the appropriate treatment of nonequity financial interests and multiple business interrelationships between licensees.

77. We review these relationships in light of the fundamental economic principle that the conduct and control of business organizations may at times be influenced by nonequity interests. In particular, debtholders may in particular circumstances be in a position to exert influence over day-to-day management of a firm, especially when coupled with other interests. In addition to reviewing the remaining aspects of our cross-interest policy, we review issues raised by such interests and other multiple business interrelationships, and inquire whether case-by-case oversight of these interests and the remaining cross-interest relationships is necessary.

A. The Cross-Interest Policy

78. Background. The cross-interest policy originally developed in the 1940s as a

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[127] 4 FCC Rcd 2035 (1989).

[128] Notice of Inquiry in MM Docket No. 87-154, 2 FCC Rcd 3699 (1987) ("Cross-Interest Notice of Inquiry").

supplement to the "duopoly" rule, a multiple ownership rule which then prohibited the common ownership, operation, or control of two stations in the same broadcast service serving substantially the same area. At that time, either actual working control or ownership of 50 percent or more of the stock of a licensee was necessary to trigger the "ownership, operation or control" requirement of the duopoly rule. Thus, the original local ownership restrictions did not encompass minority stock ownership, positional interests (such as officers and directors), and limited partnership interests. The cross-interest policy was developed to address the competitiveness and diversity concerns created when a single entity held these types of otherwise permissible interests in two (or more) competing outlets in the same market.

79. The cross-interest policy evolved almost entirely through case-by-case adjudication, and through this process the following came to be viewed as constituting "meaningful" interests subject to the policy: key employees, joint ventures, nonattributable equity interests, consulting positions, time brokerage arrangements, and advertising agency representative relationships.[129] The cross-interest policy did not prohibit these interests outright, but required an ad hoc determination regarding the nonattributable interests at issue in each case.

80. In 1987, the Commission initiated a comprehensive review to assess the continuing need for the cross-interest policy in light of the increasingly competitive environment facing the broadcast industry and the 1984 revisions to the Commission's attribution rules.[130] Based on this review, the Commission issued a Policy Statement limiting the scope of the cross-interest policy so that it would no longer apply to consulting positions, time brokerage arrangements and advertising agency representative relationships.[131] This decision was based on a number of factors. First, changes in our ownership and attribution rules had to a large extent superseded cross-interest regulation with respect to the relationships that most significantly affected competition and diversity. Second, the record suggested that the cross-interest policy may be impeding the ability of broadcasters to compete in today's multimedia market by possibly limiting their ability to adopt more efficient forms of organization. Third, there had been enormous growth in the number and variety of media outlets since the cross-interest policy was first established. Consequently, the media marketplace had become significantly more competitive and diverse, diminishing the need for continued cross-interest regulation to achieve these objectives. Fourth, there were numerous alternative safeguards, such as federal and state antitrust laws, fiduciary duties and private contract rights, which addressed the same competition and diversity concerns that formed the basis for the cross-interest policy. In light of these factors, the

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[129] See Cross-Interest Notice of Inquiry, 2 FCC Rcd at 3699-3700.

[130] Id.

[131] Policy Statement in MM Docket No. 87-154, 4 FCC Rcd 2208 (1989) ("Cross-Interest Policy Statement").

Commission determined that the burden and uncertainty created by continued cross-interest regulation of consulting positions, brokerage arrangements, and advertising agency representative relationships could no longer be justified.

81. Current Aspects of the Cross-Interest Policy. Although we indicated that the foregoing factors justified elimination of certain aspects of the cross-interest policy, we issued the Cross-Interest Notice to seek further comment concerning key employees, nonattributable equity interests, and joint ventures. We solicited comment on whether retention of the remaining cross-interest policies was necessary to prevent anticompetitive practices, whether alternative deterrent mechanisms exist to assure competition and diversity, and whether continued regulation of relationships not specifically addressed by the Commission's attribution rules is necessary. We also questioned whether regulatory oversight of one or more of these interests should be limited to geographic markets with relatively few media outlets. As described below, only five comments and reply comments were filed in response to the Cross-Interest Notice.[132]

82. Key employee relationships. The cross-interest policy has generally prohibited an individual who serves as a key employee, such as general manager, program director, or sales manager, of one station from having an attributable ownership interest in or serving as a key employee of another station in the same community or market.[133] The application of the cross-interest policy in these situations is premised on the potential impairment to competition and diversity and the apparent conflict of interest arising from the ability of key employees to implement policies to protect their substantial equity interest in the other station. The majority of commenters urged the Commission to eliminate the cross-interest policy relating to key employees.[134] They contended that key employees, particularly in smaller corporations, are frequently also officers, directors, or cognizable shareholders and, therefore, are regulated by the current attribution rules. Moreover, to the extent that key employees are not restricted by the attribution rules, these commenters asserted that they are obligated to act in the best interests of their employer and to avoid potential conflicts of interest.[135] According to these commenters, internal conflict of interest policies and common

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[132] See Comments of CBS, Inc. ("CBS"), National Association of Broadcasters ("NAB"), and Home Shopping Network, Inc. ("HSN"); Reply Comments of Consumer Federation of America and Telecommunications Research and Action Center ("CFA/TRAC"); Capital Cities/ABC, Inc. ("Capital Cities/ABC"). We will incorporate into the record of this proceeding the comments and reply comments filed in response to the Cross-Interest Notice along with the comments and replies filed in response to the Cross-Interest Notice of Inquiry.

[133] See Cross-Interest Notice, 4 FCC Rcd at 2035.

[134] See Comments of CBS and NAB; Reply Comments of Capital Cities/ABC.

[135] See Comments of CBS at 18.

law fiduciary duty and contract remedies ensure this.[136] Commenters also maintained that licensees have an incentive to police potential employee conflicts of interest given the competitive marketplace in which they operate.[137] CFA/TRAC and London Bridge Broadcasting, Inc., on the other hand, urged the Commission to retain the cross-interest policy as it applies to key employees, contending that the influence of key employees on station operations is akin to that of station owners, and therefore they should be treated similarly for purposes of attribution. These parties also questioned the efficacy of the conflict of interest policies and other remedies in deterring abuse.

83. Nonattributable equity interests. The relationship proscribed by the cross-interest policy typically involves an individual who has an attributable interest in one media outlet and a substantial nonattributable equity interest in another media outlet in the same market.[138] The Commission's concern with these relationships has been that the individual could use the attributable interest in one media outlet to protect the financial stake in the other media outlet, thus impairing arm's length competition. (Two or more separate non-attributable interests in a market are not proscribed by this policy, as neither gives rise to the potential to influence station operations that would concern us.) The majority of commenters addressing this issue urged the Commission to eliminate application of the cross-interest policy to nonattributable equity interests.[139] These parties questioned the continued need for cross-interest review in light of the amended attribution provisions of the multiple ownership rules.[140] According to these commenters, any residual concerns not covered by the Commission's ownership rules can be deterred by the competitive marketplace as well as remedies provided by private contracts, federal and state antitrust laws, and fiduciary duties. These parties further maintained that the ad hoc nature of the cross-interest policy imposes administrative burdens and creates uncertainty, impeding the ability of broadcasters to raise capital. In contrast, CFA/TRAC urged the Commission to retain the cross-interest policy as it applies to

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[136] See Comments of CBS at 18-19; NAB at 5. CBS attached to its comments a copy of its conflict of interest policy.

[137] See Comments of CBS at 19.

[138] Such nonattributable interests might include nonvoting stock, insulated limited partnership interests and minority stock interests in corporations having a single majority stockholder. The Cross-Interest Notice expressly excluded from the scope of this proceeding equity interests that are nonattributable because they are below the 5 percent attribution benchmark and thus are not sufficiently substantial to induce anticompetitive conduct. 4 FCC Rcd at 2040 n.12.

[139] See, e.g., Comments of CBS, NAB, HSN. See also Comments of Morgan Stanley and Cox (submitted in response to the Cross-Interest Notice of Inquiry).

[140] See Comments of CBS at 15-17; NAB at 5-7; HSN at 3-6; Cox at 8-13; and Morgan Stanley at 17-19.

nonattributable equity interests, arguing that this policy continues to serve an important role and that the uncertainty produced by ad hoc application of the policy is not as great as other commenters indicate.

84. Joint venture arrangements. The cross-interest policy has prevented two local broadcast licensees from entering into joint associations to buy or build a new broadcast station, cable television system, or daily newspaper, in the same market.[141] These joint ventures have triggered cross-interest scrutiny because the successful operation of the joint venture was thought to require a cooperative relationship between otherwise competing stations, and this would impair competition in the local market. Most of the commenters responding to the Cross-Interest Notice urged the Commission to eliminate cross-interest review of joint ventures. In support of this position, the commenters argued that cross-interest regulation of joint ventures has been largely displaced by the current attribution rules. They maintained that where the interests involved are not attributable, such interests lack the requisite potential for influence to warrant regulatory scrutiny. These parties also asserted that the marketplace is sufficiently competitive to deter abuse in this area, and that the antitrust laws provide an additional safeguard. Again, CFA/TRAC took issue. It argued that continued regulation of joint ventures pursuant to the cross-interest policy is necessary, especially given the Commission's relaxation of the multiple ownership rules. CFA/TRAC questioned whether joint venturers will compete vigorously at all times, and argued that "advertising and promotion practices, sales territories and audience selection -- not to mention cross-interest -- can complement the interests of joint venturers."[142]

85. Discussion. The commenters supporting the elimination of the remaining aspects of the cross-interest policy put forth four general arguments: (1) The cross-interests that implicate diversity and competition concerns are now covered by our multiple ownership rules; (2) The video entertainment marketplace has become increasingly competitive, thus

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[141] Certain joint venture interests are now covered under our attribution rules. For example, our ownership rules would now cover the case in which the cross-interest policy was first applied to joint ventures, Macon Television Co., 8 RR 703, 704-5 (1952). In that case, we prohibited a joint venture involving two radio stations in the same market from acquiring a license for a television station in that market. Today, each radio station's 50 percent interest in the television station would trigger the Commission's rule governing the common ownership of a commercial radio station and a commercial television station in the same market. See 47 C.F.R. § 73.3555(c). The ownership and attribution rules, however, have not completely supplanted the cross-interest policy as it applies to joint ventures. For example, our local ownership rules do not preclude radio stations that operate in the same market from engaging in a joint venture to build or buy another radio station in that market up to certain ownership levels. See id. at § 73.3555(a)(1); Cross-Interest Notice, 4 FCC Rcd at 2037.

[142] Reply Comments of CFA/TRAC at 15.

diminishing the need for regulatory oversight of cross-interests; (3) Alternative remedies, such as the antitrust laws and internal conflict of interest policies, will serve to deter abuses stemming from cross-interests; and (4) The cross-interest policy imposes significant burdens in terms of administrative costs and uncertainty, chilling investment in the broadcast industry. We believe each of these arguments has merit, and continue to question the continuing need for our cross-interest policy in its present form. To the extent aspects of the policy no longer serve the public interest, they should be eliminated; we also strive to clarify aspects of the policy that may warrant continued enforcement.

86. For a number of reasons, however, we believe we need to develop a more complete and updated record in our review of the cross-interest policy as applied to key employees, joint ventures, and nonattributable equity interests. First, it is appropriate to afford parties the opportunity for further comment concerning the issues raised in the Cross-Interest Notice in light of the review of the attribution rules now underway. Second, after soliciting comments in the Cross-Interest Proceeding, we subsequently relaxed our radio ownership rules in a number of respects, and today propose to relax our television ownership rules. There is an important interplay between the cross-interest policy and our ownership and attribution rules, given that both seek to address the same competition and diversity concerns. It is consequently necessary as a general matter to update the record to ensure that changes in these interrelated policies are coordinated. Moreover, as set forth below, we also seek comment regarding whether multiple cross interests and business relationships between stations, when viewed in combination, raise diversity and competition concerns, an issue that the commenters did not address.

87. On a more specific level, we also seek comment regarding a number of issues either not addressed in the comments or raised by the comments themselves. As set forth below, these issues involve the four principal arguments for modifying the cross-interest policy as well as the possible means of narrowing the policy to the extent we determine that certain aspects should continue to be enforced.

88. As noted above, a number of parties argued that our ownership and attribution rules have supplanted the remaining aspects of our cross-interest policy that implicate diversity and competition concerns. It is true that our attribution rules have evolved to the point where they now apply to a number of interests formerly covered only by the cross-interest policy. We seek comment, however, on whether this argument is undermined by the proposed changes to our attribution rules. For example, would there be a heightened need for the cross-interest policy as it applies to nonattributable equity interests if we raise our attribution benchmark for voting stock from 5 percent to 10 percent? Similarly, will relaxation of our radio and television ownership rules require us to take a more cautious approach in modifying our cross-interest policy? To be sure, a number of parties argued that our ownership and attribution rules reflect the Commission's expert judgment regarding what confers sufficient influence and control over station operations to require regulatory

intervention.[143] But while this generally will be the case, there remains the question of whether particular situations warrant case-by-case review to determine whether a cross-interest poses diversity and competition concerns. For example, while a nonvoting stock interest may not generally raise the likelihood of influence over a station's operations and therefore is not attributable, does such an interest require continued oversight under the cross-interest policy when it is a sizable investment or the majority equity interest in the licensee, or when the holder already has attributable interests in the maximum number of stations in the market? We seek comment with respect to these issues, and request commenters to be specific in defining the particular situations and harms they may believe require continued application of the cross-interest policy.

89. We also seek further comment on the argument that the increased competition facing broadcasters eliminates the need for the cross-interest policy. We certainly agree as a general matter that broadcasters are facing increased competition; indeed, since we initiated our cross-interest inquiry the video entertainment marketplace has become even more competitive, with this trend expected to continue as the communications industry undergoes further changes with the emergence of new technologies. But we seek comment on whether there are smaller markets with an insufficient number of media outlets to assume that competition will deter the abuses our cross-interest policy seeks to prevent. If parties believe this to be the case, we ask them to define the size and nature of the markets that raise such concerns.

90. Commenters favoring the elimination of the remaining aspects of the cross-interest policy point to the burdens and uncertainty it creates. Given the nature of case-by-case review, enforcement of the policy does impose administrative burdens, both on the Commission and on applicants, and can lead to results that are difficult to predict in advance. We ask parties, however, to submit, if possible, evidence to support the assertion that the cross-interest policy has impeded the ability of broadcasters to raise capital. We also seek comment regarding the extent, if any, of a shortage of key employees, especially in smaller markets, that may be exacerbated by our cross-interest policy.

91. In addition, CFA/TRAC raised several questions regarding the alternative remedies that other parties maintain lessen the need for the remaining aspects of our cross-interest policy. How common, and how effective, are the internal conflict of interest policies cited by CBS and other parties as providing a means to deter abuses stemming from key employee cross-interests? While the antitrust laws deter anticompetitive conduct, do they address the diversity concerns behind the cross-interest policy? We seek comment as to these questions and more generally as to the effectiveness of these alternative remedies.

92. Finally, we received no comment on ways to clarify and possibly narrow the cross-interest policy in the event we determine that continued enforcement is appropriate.

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[143] See Comments of CBS at 15-17; HSN at 3-6.

While most parties did not address this issue because they supported complete elimination of the policy, even commenters who supported continued enforcement offered no guidance other than to state generally that there is "ample room for streamlining."[144] We consequently seek specific suggestions as to how we might clarify the cross-interest policy. We also seek comment on the following means of narrowing the policy: (1) Should we limit the application of the cross-interest policy to smaller markets where competition and diversity are of particular concern, and, if so, how should we define these markets? (2) Should we enforce the cross-interest policy only where the cross-interest, if attributable under our attribution rules, would violate the ownership rules?[145] (3) With respect to nonattributable equity interests, should we limit review only to those interests reaching a certain level of ownership, or when those interests exceed or reach a certain percentage of the licensee's voting equity?

B. Non-Equity Financial Relationships and Multiple Business Interrelationships

93. In our review of the cross-interest policy, we have focused on each cross-interest individually. But broadcasters in particular markets may also at times enter into a number of different business relationships between themselves. Such interrelationships may be spurred by a number of factors, including the increasing sophistication of the financial markets and the incentive for broadcasters to enter into cooperative arrangements to meet the challenges of the evolving communications industry. While we recognize the important role cooperative arrangements can play, we seek comment as to whether multiple "cross-interests" or otherwise nonattributable interests, when viewed in combination, raise diversity and competition concerns warranting regulatory oversight.

94. The nature of broadcaster interrelationships can vary widely. They can take the form of a combination of nonattributable interests, such as debt and nonvoting equity. Or, shareholders with otherwise nonattributable interests can combine those interests via voting agreements or other contractual relationships or business relationships. Such interrelationships may also involve family relationships in conjunction with other interests. Many of these business interrelationships serve legitimate purposes and, indeed, have been encouraged by the Commission. For instance, in its review of the radio ownership rules, the Commission determined that it would continue to allow separately owned radio stations to function cooperatively in terms of advertising sales, technical facilities, formats and other aspects of station operation as long as each licensee retains control of its station and complies

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[144] Comments of CFA/TRAC at 1. See also Comments of Amherst Broadcasting (submitted in response to the Cross-Interest Notice of Inquiry).

[145] Under this proposal, for example, scrutiny of a nonattributable cross-interest would only be triggered if the holder of the interest already had attributable interests in the maximum number of broadcast stations.

with the Communications Act, the Commission's rules and policies and the antitrust laws.[146] In addition to permitting such joint arrangements,[147] the Commission also continued to allow time brokerage agreements, also referred to as local marketing agreements ("LMAs"), between radio stations, although it imposed certain restrictions on such agreements if the stations involved operated in the same local market.[148] Television broadcasters are also permitted to enter into LMAs, although we have solicited comment as part of our review of the television ownership rules as to whether we should regulate these arrangements as we have in our radio rules.[149] Television broadcasters also are no longer prohibited by our rules from engaging in combination advertising and joint sales practices.[150]

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[146] Report and Order in MM Docket No. 91-140, 7 FCC Rcd 2755, 2787 (1992) ("Radio Ownership Order"), recon. granted in part, 7 FCC Rcd 6387 (1992) ("Radio Ownership Reconsideration Order"), further reconsidered, FCC 94-267 (adopted Oct. 20, 1994; released Nov. 8, 1994), _____ FCC Rcd _____ (1994).

[147] As the Commission has made clear, the joint arrangements in this context involve cooperative sales, advertising and other such arrangements between broadcasters, and should be distinguished from the joint ventures that are subject to the cross-interest policy; the latter involves broadcast stations operating in the same service in the same market that seek to construct or purchase a broadcast station in another service in that market. Notice of Proposed Rule Making in MM Docket No. 91-140, 6 FCC Rcd 3275, 3281 n.41 (1991)

[148] In particular, the Commission concluded that where an individual or entity owns or has an attributable interest in one or more stations in a market and time brokers any other station in that market for more than 15 percent of the brokered station's broadcast hours per week, the brokered station will be counted toward the brokering licensee's permissible ownership totals under the local and national ownership rules. Licensees are also prohibited from duplicating more than 25 percent of their owned station's programming through brokered stations (or otherwise) where both stations are in the same service and serve substantially the same area. We also imposed certain public file and reporting requirements on licensees engaged in time brokerage arrangements. Radio Ownership Order, 7 FCC Rcd at 2788-89; Radio Ownership Reconsideration Order, 7 FCC Rcd at 30-36.

[149] See Notice of Proposed Rule Making in MM Docket No. 91-221, 7 FCC Rcd 4111, 4115-16 (1992). In another Notice adopted today, in MM Docket Nos. 94-149 and 91-140, we seek comment about the impact, if any, of LMAs on ownership by minorities and women of broadcast facilities.

[150] See Second Report and Order in MM Docket No. 83-842, 59 RR 2d 1500, 1511-18 (1986), on recon., 2 FCC Rcd 3474 (1987). Under our network representation rule, however, we continue to prohibit television stations, other than those "owned and operated" by a television network, from being represented by their network in the spot sales market. Report and Order in BC Docket No. 78-309, 5 FCC Rcd 7280 (1990).

95. We do not intend to reopen our decisions in our radio ownership proceeding concerning radio joint arrangements or time brokerage arrangements. Nor do we wish to reopen our previous decision regarding joint sales practices in the television industry, or to incorporate here the issues we have raised in our pending television ownership proceeding concerning television time brokerage agreements. We do, however, seek comment as to whether ostensibly separately owned stations could so merge their operations, through a variety of joint enterprises or cooperative agreements, perhaps in conjunction with other nonattributable interests, and thereby create such close business interrelationships as to implicate our diversity and competition concerns.

96. For instance, there may be circumstances where a substantial debtholding should trigger a cross-interest analysis when it is accompanied by a number of other close business interconnections. As stated at the outset, in devising our attribution rules we seek to identify those interests that convey to their holders a realistic potential to influence the operations of the licensee in core areas such as programming and competitive practices, while balancing our concern to avoid unnecessary and costly regulatory intervention by minimizing the attribution of noninfluential interests.[151] Our theoretical analysis recognizes that holders of non-equity interests can have influence on a licensee in ways that may be of concern. Along those lines, we recognize that debt and other contractual relationships can have the associated potential to exert influence on core operational decisions of the licensee. There is evidence suggesting that the distinction between debt and equity based on voting rights is no longer clear,[152] and we recognize that debtholders have, for some time, required borrowers to meet certain financial conditions or face the prospect of forced bankruptcy. While corporations have no obligation to give debtholders voting rights, except in bankruptcy, it is not unusual for a corporation's bankers to have representation on the firm's board of directors. (In such cases, of course, attribution attaches to the directorship.)

97. In 1984, we decided to exclude debt from attribution on the supposition that attributing debt would severely restrict capital sources for broadcasters, and because debt financing was the least likely of all financing sources to involve an interest that implicates the multiple ownership rules.[153] We believe, at this point, that we should continue to exclude such relationships, standing alone, from attribution under the multiple ownership rules because any other approach would, we believe, severely impair the ability of the broadcasting industry to obtain necessary capital. We would neither wish to inhibit such a key means of obtaining capital nor to disrupt existing expectations and relationships to such a degree. If any commenters disagree with this conclusion, we invite them to demonstrate to us that the benefits of extending our attribution rules to debt and other similar contractual relationships

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[151] See supra, ¶¶ 12-16.

[152] See "Are the Distinctions between Debt and Equity Disappearing?," (R. W. Kopcke and E. Rosengren eds.) Federal Reserve Bank of Boston, Conference Series #33 (1989).

[153] Attribution Order, 97 FCC 2d at 1022.

outweigh the significant drawbacks we have delineated.

98. While we do not intend to reconsider our 1984 decision not to recognize debtholdings per se as attributable interests, there may be circumstances where debtholding, accompanied by a number of other close business interconnections, should be considered to be attributable. The debtholder, for example, a licensee of another station in the same market, may have also entered into a joint sales or other cooperative arrangement with the debtor station. The identity of the debtholder may be of particular significance: debt financing by institutional lenders may not be as significant to our concerns as debt financing by a multi-station owner, or by the seller of a station, or by the owner of another station in the same market. With respect to institutional lenders, it has been our belief that the nature of such institutions ensures that any risk of attempts to influence or control the licensee debtor will be remote and minimal, and it is therefore unnecessary to consider such interests as cognizable. Moreover, we understand that debt financing by banks is a critical, widely-used, source of financing, that institutional lenders are limited in number, and that it would therefore harm the industry and the public if such debt were found cognizable for purposes of our multiple ownership rules. Another important factor would be the amount of the debt and whether the terms of the credit agreement provide the debtholder leverage over the day-to-day operations of the licensee.

99. We seek comment regarding the potential for debt or other nonattributable interests, in conjunction with a series of cooperative or contractual arrangements, to provide their holders the ability to influence the day-to-day operations of a licensee, thus implicating our competition and diversity concerns. More generally, we seek comment regarding the possibility that our ownership and attribution rules may be underinclusive in certain cases, failing to capture particular concentrations or conglomerations of ownership or influence that undermine diversity and competition. A combination of otherwise nonattributable interests and business relationships, while not raising any concern when viewed in isolation, could possibly add up to create sufficient influence to warrant attribution. We seek comment as to the extent, if any, of such underinclusiveness in our rules, and whether there are certain types of combinations of business interrelationships, such as the debtholding relationship described above, that should be of particular concern.

100. Any regulation of such interrelationships, given their varying forms, would require case-by-case review in the context of applications for new stations or transfer or assignment applications. We seek comment as to whether the burdens and uncertainty created by such review would be outweighed by the perceived benefits of addressing the concerns in this area, and whether these concerns are best addressed in the context of our real-party-in-interest rules and de facto transfer of control challenges. We also seek comment as to whether any review of such close business interrelationships should be limited to those markets where the lack of competition and diversity is a particular concern, and how such markets should be defined. In addition, should we focus on combinations of business interrelationships among stations in the same market only, or do inter-market relationships among stations also warrant review? We wish to emphasize that in considering these issues

we are sensitive to the need not to inhibit capital flow into the broadcast industry or unduly disrupt existing financial arrangements.

IX. CONCLUSION

101. By this Notice of Proposed Rule Making, we request comments on the many issues pertinent to our analysis of whether the current attribution rules continue to be effective in serving their goals or whether changes to the rules are required. Additionally, we request comment on how to treat Limited Liability Companies and Registered Limited Liability Partnerships for attribution purposes. The attribution rules are a critical enforcement mechanism for the Commission as it applies its multiple ownership rules. We expect that our review of these rules will be thorough and far-reaching, as discussed herein, and we ask commenters to give serious and thoughtful consideration, supported by empirical analysis and rigorous economic theories, to the important issues raised herein.

X. ADMINISTRATIVE MATTERS

102. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, 47 C.F.R. Sections 1.415 and 1.419, interested parties may file comments on or before April 17, 1995, and reply comments on or before May 17, 1995. All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding. To file formally in this proceeding, you must file an original plus four copies of all comments, reply comments, and supporting comments. If you want each Commissioner to receive a personal copy of your comments, you must file an original plus nine copies. You should send comments and reply comments to Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center (Room 239), 1919 M Street, N.W., Washington, D.C. 20554.

103. This is a non-restricted notice and comment rulemaking proceeding. Ex parte presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in the Commission Rules. See generally 47 C.F.R. Sections 1.1202, 1.1203, and 1.1206(a).

104. Additional Information. For additional information on this proceeding, contact Mania K. Baghdadi (202-632-7792), or Robert Kieschnick (202-632-6302), Mass Media Bureau.

105. Initial Regulatory Flexibility Analysis. See Appendix attached.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

APPENDIX

Initial Regulatory Flexibility Analysis

I. Reason for the Action: This proceeding was initiated to obtain comment on whether the Commission's broadcast attribution rules continue to be effective in serving their intended goals, and on whether they should be revised in certain areas to more effectively achieve those goals.

II. Objective of this Action: The actions proposed in the Notice are intended to assure that the Commission's broadcast attribution rules effectively implement the Commission's broadcast multiple ownership rules by identifying those interests that have the potential to influence the licensee in core operating areas, such as programming.

III. Legal Basis: Authority for the actions proposed in this Notice may be found in Sections 4,303, and 310 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154, 303, 310.

IV. Reporting, Recordkeeping and Other Compliance Requirements Inherent in the Proposed Rule: If the attribution rules are changed, the Commission would have to change the reporting requirements in the Commission's annual ownership report form, accordingly, as the attribution rules determine which broadcast interests must be reported to the Commission and are counted for multiple ownership purposes.

V. Federal Rules Which Overlap, Duplicate or Conflict with the Proposed Rule: None.

VI. Description, Potential Impact and Number of Small Entities Involved: Approximately 11,000 existing television and radio broadcasters of all sizes may be affected by the proposals contained in this decision. After evaluating the comments in this proceeding, the Commission will further examine the impact of any rule changes on small entities and set forth our findings in the Final Regulatory Flexibility Analysis.

VII. Any Significant Alternatives Minimizing the Impact on Small Entities and Consistent with the Stated Objectives: The Notice solicits comments on a variety of alternatives.

As required by Section 603 of the Regulatory Flexibility Act, the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) of the expected impact on small entities of the proposals suggested in this document. Written public comments are requested on the IRFA. These comments must be filed in accordance with the same filing deadlines as comments on the rest of the Notice, but they must have a separate and distinct heading designating them as responses to the Regulatory Flexibility Analysis. The Secretary shall send a copy of this Notice of Proposed Rule Making, including the IRFA, to the Chief

Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act (Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. Section 601 et seq. (1981)).

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FCC 94-339

In the Matter of	)	
	)	
Section 208 Complaints Alleging Violations of the Commission's Rate of Return Prescription for the 1989-1990 Monitoring Period	)	File Nos. E-93-104, et al.

MEMORANDUM OPINION AND ORDER

Adopted: December 23, 1994; Released: December 23, 1994

By the Commission:

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I. INTRODUCTION

1. In this Memorandum Opinion and Order we find that the complainants in these consolidated Section 208 proceedings[1] have met their burden of establishing that the defendant local exchange carriers (LECs) have violated Section 201(b) of the Communications Act of 1934, as amended, (the "Act"),[2] by earning in excess of the rate of return for interstate access services prescribed by the Commission for the period January 1, 1989 through December 31, 1990. We also find that certain of the defendants have made persuasive claims for offsets based on the complainants' purchases of access services in categories in which the defendants realized earning shortfalls during the period in question. Therefore, we award monetary damages net of offsets, plus interest computed at the relevant Internal Revenue Service (IRS) rate compounded daily, to those complainants who have successfully shown that they incurred actual damages as a consequence of the defendants' violations.

II. BACKGROUND

2. In 1993, the complainants here filed complaints alleging, inter alia, violations by defendants of the Commission's rate of return prescription for the 1989-1990 monitoring period.[3] After the completion of discovery, the parties to the various proceedings were required to submit initial briefs and reply briefs setting forth their respective claims and arguments.[4] The complaint proceedings thereafter were consolidated. The issues presented in these consolidated complaint proceedings are virtually identical to those presented by the complainant

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1 The complainants, the defendants, and the acronyms used to identify them in this Order are identified in Appendix A. Because of the similarity of the issues and arguments raised by the various parties, the proceedings have been consolidated for disposition.

2 47 U.S.C. § 201(b). This Section provides, in pertinent part, that "[a]ll charges, practices, classifications, and regulations for and in connection with ... communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is hereby declared to be unlawful."

3 All the defendants filed answers, and several filed motions to dismiss.

4 In the instant proceedings, the complainants and the defendants all filed briefs and reply briefs pursuant to the schedules established by the Formal Complaints and Investigations Branch (the Branch) except in File No. E-93-134, complainant EATEL did not submit an initial brief but did file a reply brief. MCI did not file a reply brief in that proceeding. When referenced, the parties' briefs (Br.) and reply briefs (RBr.) will be indicated by file number (e.g., CBT Br., File No. E-93-120).

in MCI Telecommunication Corp. v. Pacific Northwest Bell Telephone Co.[5] In that proceeding, the Commission held that LEC rates that produced earnings in excess of a Commission prescription were unjust and unreasonable within the meaning of Section 201(b) of the Act. The Commission also held that a complainant customer is entitled to recover damages to the extent that it can show that it suffered actual damage as a consequence of such violations. Subsequently, in the damages phase of the proceeding, the Commission held that MCI had properly shown that it had been harmed by paying the defendants' rates that produced the excessive earnings. The Commission awarded the complainant monetary damages, plus interest computed at the IRS rate.[6]

III. DISCUSSION

A. Liability For Damages

1. Contentions of the Parties

3. The complainants allege[7] that the rates they paid for certain of the defendants' interstate access services during the period from January 1, 1989 through December 31, 1990 were unjust and unreasonable in violation of Section 201(b) of the Act. To support their allegations, the complainants present evidence taken from reports filed with the Commission by the defendants for the two-year period at issue, which show that the defendants achieved earnings in excess of the Commission's prescribed rate of return in one or more of the three interstate access

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5 5 FCC Rcd 216 (1990) (MCI Liability Order), recon. denied, 5 FCC Rcd 3463 (1990) (MCI Reconsideration Order) (jointly "MCI Liability Orders"), appeal dismissed sub nom. Mountain States Tel. and Tel. Co. v. FCC, 951 F.2d 1259 (10th Cir. 1991) (per curiam); see also, American Tel. and Tel. Co. v. Northwestern Bell Tel. Co., 5 FCC Rcd 143 (1990) (AT&T Liability Order), appeal dismissed sub nom. Mountain States Tel. and Tel. Co. v. FCC, 951 F.2d 1259 (10th Cir. 1991) (per curiam).

6 MCI Telecommunications Corp. v. Pacific Bell Tel. Co., 8 FCC Rcd 1517 (1993) (MCI Damages Order), appeals docketed sub nom. MCI Telecommunications Corp. v. FCC, No. 93-1166 et al. (D.C. Cir. Feb. 18, 1993); see also AT&T Communications v. Northwestern Bell Tel. Co., 8 FCC Rcd 1014 (1993) (AT&T Damages Order), appeal docketed sub nom. U S WEST Communications, Inc. v. FCC, No. 93-1223 (D.C. Cir. Mar. 22, 1993).

7 The arguments and claims made by the various complainants and defendants are, for the most part, identical in their essentials. For convenience and clarity, we refer to the "complainants' arguments" or the "defendants' arguments" as if they were raised in a unitary set of pleadings. To the extent that individual complainants or defendants make unique or separate arguments, we address them specifically.

categories established for the purpose of enforcing that rate of return prescription.[8]

4. The complainants request that the Commission declare that the defendants' charges for the period from January 1, 1989 through December 31, 1990 violated the rate of return prescription and Section 201(b) of the Act, and order the defendants to pay damages to the complainants equal to the difference between the amount actually paid by the complainants for interstate access service during the period and the amount that the complainants would have paid if the defendants' charges had earned no more than the maximum allowable rate of return, plus interest.

5. The defendants advance a number of arguments to support their claims that they cannot be held liable for damages based solely on the fact that their rates produced earnings in excess of the Commission's prescribed rate of return. The defendants first argue that the complainants have failed to state a cause of action under Section 208 of the Act. The defendants contend that earning in excess of a rate of return prescription is not a violation of the Act or any valid Commission rule or order;[9] and most of the defendants argue that even if such action could be considered a violation, it could occur only if the return was exceeded by the company "overall."[10]

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8 The interstate access service categories are special access, common line, and switched traffic sensitive. See 47 C.F.R. § 65.702. The rates of return reported for the various defendants on their Forms 492 for the 1989-1990 monitoring period are set forth in Appendix B.

9 USWC argues that the issue of overearnings liability for the 1989-1990 pre-price cap period is still unresolved and that the Commission stated that it would revisit the issue of how to reflect overearnings and refunds for that period. See, e.g., USWC Br. at 19, File No. E-93-123 citing to Policy and Rules Concerning Rates for Dominant Carriers, CC Docket No. 87-313, Order on Reconsideration, 6 FCC Rcd 2637, 2691-92 (1991). CBT argues that the Commission has not yet promulgated new refund rules, as suggested by the court in AT&T v. FCC, 836 F.2d at 1392, that would ensure that the enforcement of rates of return would maintain the appropriate balance between the interests of consumers and investors. CBT Br. at 5, File No. E-93-135. NYT further argues that in the absence of action by the Commission on the court's remand in AT&T v. FCC, there is no valid rule requiring refunds of either category or overall interstate overearnings. NYT Br. at 5, File No. E-93-119. BellSouth also argues that there can be no liability based on a violation of Section 65.700 of the Commission's rules because Section 65.700 no longer exists. BellSouth Br. at 3, File No. E-93-127.

10 See, e.g., NYT Br. at 10, File No. E-93-125; Pacific Br. at 8, File No. E-93-117.

6. To bolster these arguments, the defendants contend that the complaints are barred by the D.C. Circuit's decision in American Telephone & Telegraph Co. v. FCC[11] and a later decision by the Sixth Circuit in Ohio Bell Telephone Co. v. FCC.[12] Most of the defendants argue that recasting what amounts to a "refund" as a "damage award" does not cure the deficiencies the court found with a procedure that effectively requires the automatic refund of carrier overearnings but does not permit carriers to recoup earning shortfalls.[13] Several of the defendants argue that, consistent with AT&T v. FCC, the Commission must consider a carrier's overall earnings in determining whether a carrier's category earnings levels are in violation of the Act. These defendants therefore maintain that to the extent that their earnings for overall interstate access services did not exceed the allowed 12.25 percent, there can be no violation of the Act regardless of the earnings realized in individual access service categories. In addition, these defendants contend that the court's decision in Ohio Bell, issued after the release of the MCI Liability Order, reaffirms the proposition established in AT&T v. FCC that the Commission cannot entertain complaints for damages based on category-level interstate access overearnings. Several defendants maintain that these propositions are not confined to the Commission's

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11 836 F.2d 1386 (D.C. Cir. 1988) (AT&T v. FCC). In AT&T v. FCC, the court invalidated the Commission's procedure designed to enforce its rate of return prescriptions through the automatic refund of carrier overearnings to customers.

12 949 F.2d 864 (6th Cir. 1991) (Ohio Bell). In Ohio Bell, the court, relying on AT&T v. FCC, vacated a Commission order that in the context of a strategic pricing investigation had directed refunds of LEC earnings in excess of the authorized rate of return for the special access category over a period of years. Ohio Bell, 949 F.2d at 874. The Sixth Circuit placed considerable weight on the statement in AT&T v. FCC indicating that the Commission viewed its rate of return prescription as both a floor and ceiling on carrier earnings. Ohio Bell, 949 F.2d at 873, citing AT&T v. FCC, 836 F.2d at 1390. The Commission, however, has since clarified that it does not view a rate of return prescription as both a minimum and maximum:

> [o]ur accumulated experience with rate of return prescriptions, and our review of the cost of capital evidence in this proceeding, convince us that there is no such point. * * * We believe there is a substantial gap between an earnings level that is fully adequate to assure attraction of capital on favorable terms, and an earnings level which, if sustained over time, would be confiscatory.

Represcribing the Authorized Rate of Return for Interstate Services of Local Exchange Carriers, 5 FCC Rcd 7507, 7532 (1990), petition for review denied sub nom. Illinois Bell Tel. Co. v. FCC, 988 F.2d 1254 (D.C. Cir. 1993).

13 See, e.g., NYT Br. at 7, File No. E-93-119; EATEL RBr. at 8-10, File No. E-93-134.

ratemaking activities under Sections 204-205 of the Act but are equally applicable when the Commission decides private complaints for damages under Section 208 of the Act.[14]

7. Several of the defendants next contend that the Commission has no authority to order a refund retroactively apart from Sections 204 and 205 of the Act.[15] These defendants argue that under Illinois Bell Telephone Co. v. FCC,[16] the Commission cannot order refunds unless it has first suspended rates under Section 204 and issued an accounting order.[17] Several defendants argue that even if their rates were not actually prescribed, they were required to charge those rates under the "filed rate doctrine".[18] A number of defendants further contend that any Commission order requiring a carrier to make refunds solely because the carrier has exceeded the authorized rate of return would constitute unlawful retroactive ratemaking.[19]

8. Some of the defendants argue that complainants' claims are barred in whole or in part by Section 415 of the Act, which establishes a two-year statute of limitations on the filing of complaints not based on overcharges.[20] According to several of the defendants, Section 415 bars the recovery of any damages where the complaint was filed more than two years after the occurrence of the alleged overearning.[21]

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14 See, e.g., CBT Br. at 5-6, File No. E-93-120.

15 See, e.g., CBT Br. at 8-9, File No. E-93-135.

16 966 F.2d 1478 (D.C. Cir. 1992) (Illinois Bell).

17 See, e.g., NYT Br. at 8, File No. E-93-119; SWBT Br. at 5, File No. E-93-138.

18 See, e.g., CBT Br. at 7, File No. E-93-120; GTE Br. at 4, File Nos. E-93-104--112. The "filed rate doctrine" specifies that rates charged by common carriers must be clear from the face of the tariff in which those rates are filed. The Supreme Court has held, therefore, that "the rights as defined by the tariff cannot be varied or enlarged by either contract or tort of the carrier." Keogh v. Chicago & Northwestern R. Co., 260 U.S. 156, 163 (1922).

19 See, e.g., USWC Br. at 4, File No. E-93-151; Ameritech Br. at 14, File No. E-93-133.

20 Section 415 provides, in pertinent part, that "[a]ll complaints against carriers for the recovery of damages not based on overcharges shall be filed with the Commission within two years from the time the cause of action accrues, and not after...." 47 U.S.C. § 415(b) (1982). The term "overcharges" is defined in Section 415 "to mean charges for services in excess of those applicable thereto under the schedules of charges lawfully on file with the Commission." 47 U.S.C. § 415(g) (1982).

21 See, e.g., SWBT Br. at 11-12, File No. E-93-138; Ameritech Br. at 10-11, File No. E-93-122.

9. Finally, defendant SWBT argues that it did not overearn overall or in any category for the 1989-1990 monitoring period based on an amended final Form 492 it filed on March 31, 1992.[22] According to SWBT, it discovered in September 1991 that it had failed to reverse two accrual accounts it had set up while it negotiated settlements of two billing disputes. The two accrual accounts should have been reversed in November 1990. After correcting its books, SWBT filed an amended Form 492 on March 31, 1992.[23] Complainant MCI argues that defendant is bound by the final Form 492 defendant filed on September 30, 1991. Specifically, MCI states that our rules explicitly create a cut-off date after which amendments may not be made, that the Commission has previously held the September Forms 492 to be "final and conclusively binding," that there must be some cut-off date to facilitate enforcement, and that allowing the type of amendments present here would allow SWBT to shift revenues between periods of rate-of-return regulation and price cap regulation and would allow SWBT to manipulate the regulatory process.[24]

2. **Discussion**

10. We have carefully examined the record before us and conclude that most of the defendants' arguments must be rejected under the controlling precedent of the MCI Liability Orders.[25] The defendants have cited no facts and have made no arguments in these proceedings that would warrant rulings contrary to the MCI Liability Orders.

11. Failure to State a Cause of Action: In the MCI Liability Order, the Commission rejected identical claims made by the defendants that earnings in excess of a prescribed rate of return do not establish a cause of action under the Act. The Commission held that AT&T v. FCC, the principal case authority relied upon by the defendants, does not establish precedent barring an individual complainant from seeking relief under Section 208 of the Act for damages based on a carrier's reported overearnings.[26] Specifically, the Commission stated that:

> we are not persuaded by the defendants' claims that earning in excess of a prescribed rate of return

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22 Pacific Bell raised a similar argument that its final Form 492 did not accurately reflect its actual rate of return for the 1989-1990 monitoring period. Pacific Answer at 3 and 5, File No. E-93-117. Pacific did not raise the issue in its briefs. Therefore, we presume that Pacific no longer relies on this argument.

23 SWBT Br. at 1-3, File No. E-93-138; see SWBT Answers to Interrogatories at 4-5, File No. E-93-138; see also SWBT Form 492, filed March 31, 1992.

24 MCI Br. at 6-8, File No. E-93-138.

25 The defendants acknowledge, for the most part, that these issues have been previously rejected by the Commission. See, e.g., GTE Br. at 2 n.4, File Nos. E-93-104--112.

26 MCI Liability Order, 5 FCC Rcd at 222-23.

> does not violate that Act or, if it does, that the Commission is required to take a carrier's underearnings as well as its overearnings into account in determining whether a violation has occurred.
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> * * * * * * *
>
> We find that a valid prescription bound the defendants to a maximum earnings limitation, and the defendants admit that they earned in excess of that amount during the period in question.[27]

The Commission found further that AT&T v. FCC did not govern Section 208 complaint proceedings. The Commission has the authority to order a carrier to pay damages if a complainant meets the burden of establishing both a violation of the Act and actual injury.[28]

12. In addition, we find unavailing the defendants' arguments that there are no longer any refund rules in effect upon which liability can be based. The rate of return prescription remained in effect during the 1989-1990 period. AT&T v. FCC simply remanded the enforcement provision of those rules. Furthermore, the instant complaints seek individual damages under Section 208 of the Act, not refunds under other sections of the Act, and we therefore must address the merits of complainants' damages claims.[29]

13. AT&T v. FCC and Ohio Bell: The defendants' claim that AT&T v. FCC and Ohio Bell compel us to dismiss the complaints has no merit. As emphasized in the MCI Liability Order and reaffirmed in the MCI Damages Order, automatic refunds and refunds ordered under Section 204 of the Act are different from individual actions for damages under Section 208. Unlike the automatic refund mechanism in AT&T v. FCC or the refund procedure in Ohio Bell, both of which resulted from rulemaking proceedings initiated at the Commission's discretion, actions for damages under Section 208 are initiated by private parties seeking damages for injuries incurred as a consequence of a carrier's actions; those private

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27 Id. at 223 (emphasis in the original; footnote omitted).

28 Id.

29 We note the Commission has terminated CC No. Docket 84-800. See Authorized Rates of Return for the Interstate Services of AT&T Communications and Exchange Telephone Carriers, 7 FCC Rcd 5582 (1992). The only matters that were pending in that docket after the court's remand in AT&T v. FCC are being addressed in Amendment of Parts 65 and 69 of the Commission's Rules to Reform the Interstate Rate of Return Represcription and Enforcement Processes, CC Docket No. 92-133, Notice of Proposed Rulemaking and Order, 7 FCC Rcd 4688, 4700-2 (1992) (Amendment of Parts 65 & 69). While our determination here should not be construed to prejudge the issues and arguments presented by the parties to that proceeding, our action here is consistent with the proposals in that docket. Amendment of Parts 65 & 69, 7 FCC Rcd at 4702, para. 98.

parties have the burden of establishing both a violation of the Act and actual injury.[30] The courts in AT&T v. FCC and Ohio Bell did not discuss private complaints for damages nor invalidate private actions for damages. Thus, their holdings are not applicable to the different, separately authorized complaint process set forth in Sections 206-209 of the Act. Accordingly, those decisions do not require us to depart from the Commission's holding in the MCI Liability Order that the defendants have violated the Communications Act by earning in excess of a valid rate of return prescription, thereby making their rates unjust and unreasonable under Section 201 of the Communications Act and them liable for damages to the extent a complainant customer can establish that it was damaged as a result of the violation.[31]

14. Sections 204 and 205 of the Act. We reject the defendants' claim that the court's decision in Illinois Bell leaves the Commission only with Section 205 authority in the face of a violation of our rate of return prescription. As the Commission explained in the MCI Damages Order, Illinois Bell addresses the Commission's authority under Sections 204 and 205 of the Act, not Section 208.[32] Thus, the defendants' claim that the Illinois Bell decision deprives the Commission of authority to award damages for violations of a valid rate of return prescription is incorrect.

15. Retroactive Ratemaking. The Commission also held in the MCI Liability Order that enforcement of a rate of return prescription is not retroactive ratemaking because the obligation being enforced was set prospectively when the prescription was adopted.[33] Defendants have not persuaded us to alter that decision. The Commission has also rejected the contention that rates charged in conformity with a lawfully filed tariff cannot be unjust and unreasonable.[34] As stated in the MCI Liability Order, "legally effective, carrier-initiated tariffs can always be challenged as unreasonable and unlawful."[35] The issue raised by these complaints is not the lawfulness of high profits in the abstract, but the lawfulness of profits in excess of a prescription. Accordingly we hold that, taking into account the buffer, profits in excess of a prescription are unjust and unreasonable.[36]

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30 See MCI Liability Order, 5 FCC Rcd at 222-23, para. 55.

31 Id. at 226, para. 86.

32 See MCI Damages Order, 8 FCC Rcd at 1524-25, para. 27.

33 See MCI Liability Order, 5 FCC Rcd at 222.

34 Id.

35 Id., quoting Arizona Grocery v. Atchison, T & S.F.R. Co., 284 U.S. 370, 384 (1932).

36 See Section 208 Complaints Alleging Violations of the Commission's Rate of Return Prescription for the 1987-1988 Monitoring Period, 8 FCC Rcd 1876, 1877 (1993) (prescription violated if earnings exceed allowable rate of return plus buffer), aff'd on recon., 8 FCC Rcd 5485 (1993).

16. Rates Prescribed by the Commission. The defendants' argument that the complaints are barred because the rates in effect during the period in question were prescribed by the Commission was discussed at length and rejected in the MCI Liability Order and require no further discussion here.[37] The defendants have raised no new issues or arguments that would persuade us to depart from our previous holdings.

17. Statute of Limitations: The purpose of Section 415 is to protect a potential defendant against stale and vexatious claims by ending the possibility of litigation after a reasonable period of time has elapsed.[38] The statute does not begin to run, however, until discovery of the right or wrong or of the facts on which such knowledge is chargeable in law.[39] The Commission held in the MCI Liability Order that the two year limitations period for filing complaints against LECs based on rate of return violations did not begin to run until the defendant carriers filed their rate of return monitoring reports. The Commission emphasized that the monitoring reports were specifically designed to make information about carrier earnings "publicly available" and were designated by the Commission as "final" and conclusively binding on determinations of the carriers' earnings.[40] Defendants have made no argument that persuades us to alter this determination. Accordingly, Section 415 poses no bar to the instant complaints.

18. SWBT's Form 492. Our rules clearly state that all adjustments to LEC's Forms 492 for the period from January 1, 1989 to December 31, 1990 were to be made no later than September 30, 1991.[41] The Commission has previously held that the final Form 492 filed on September 30 is a "conclusively binding determination of a carrier's earnings" for purposes of enforcing its rate of return prescription.[42] Thus, we do not consider SWBT's late-filed adjustments to its Form 492 in determining its damages liability in these proceedings.

19. Even if we consider the totality of circumstances surrounding the proposed adjustments, we are not persuaded to alter this result. Prior to the Commission's determination in the MCI Liability Order, the Commission indicated that it would consider requests for waiver of the

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37 See MCI Liability Order, 5 FCC Rcd at 223-24.

38 Bunker Ramo Corp., 31 FCC 2d 449, 453 (1971).

39 Id. at 454.

40 Id. at 225. We note further that the Commission has held that Section 415(e) is inapplicable to the type of complaints we address here. Section 415(e) concerns a carrier's liability to its customers for failure to transmit a message in accordance with its common carrier obligations. The instant complaints deal with the lawfulness of defendants' rates, not defendants' transmissions or obligations to transmit messages properly. See MCI Reconsideration Order, 5 FCC Rcd at 3464.

41 47 C.F.R. § 65.600(b)(2).

42 MCI Liability Order, 5 FCC Rcd at 225.

Form 492 filing deadlines on a case-by-case basis if a LEC could show "extraordinary circumstances that prevent reporting of accurate data within the required time frame."[43] The record reflects that SWBT discovered what it describes as errors in two accrual accounts before the September 30, 1991 Form 492 filing deadline. SWBT has offered no explanation why it could not have reported accurate information on its Form 492, nor does it explain why it took fully six months after the deadline to amend its Form 492.[44] Further, SWBT gave virtually no justification for the adjustments contained to the March 1992 Form 492 amendment.[45] Neither this explanation nor the explanation SWBT sets forth in its briefs appears to us to present extraordinary circumstances that would warrant a waiver of the Form 492 filing deadline for the 1989-1990 reporting period. Moreover, SWBT did not seek a waiver of the Form 492 cut-off date as contemplated by the Reporting Requirements Order. SWBT also did not notify the Commission that either adjustments to its Form 492 would be forthcoming or that the Form 492 it filed contemporaneously with its discovery of the errors was inaccurate. Under these circumstances, we reject SWBT's belated attempt to adjust its reported rate of return and find that the complainants in these proceedings properly based their claims on SWBT's September 30, 1991 Form 492.

B. Damages and Interest

1. Damages

a. Contentions of the Parties

20. The complainants' damages claims rest primarily on the contention that the proper measure of damages incurred as a result of the defendants' rate of return prescription violations is the difference between the amounts the complainants actually paid the defendants for interstate access services during the January 1, 1989 through December 31, 1990 monitoring period and the amount they each would have paid if

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43 Amendment of Part 65, Interstate Rate of Return Prescription, 1 FCC Rcd 952, 954 (1986) (Reporting Requirements Order), aff'd on recon., 2 FCC Rcd 5340 (1987) (added new procedures regarding out-of-period adjustments discovered more than nine months after close of reporting period and otherwise affirmed out-of-period adjustment procedures) (Reporting Requirements Recon. Order).

44 Defendant's explanation of the adjustments attached to its March 1992 form 492 states that the error was discovered after the September 30, 1991 Form 492 was filed. However, defendant states in its brief that it discovered the error in September 1991.

45 SWBT's entire explanation is:

> Out of period adjustments for the January 1989 through December 1990 monitoring period occurring after FCC Form 492 was filed; [sic] were primarily due to an accrual for Percent Interstate Usage (PIU) and Stranded Access Revenue claims in Texas.

SWBT Br. at Exhibit A, File No. E-93-138.

the defendants' rates produced earnings that did not exceed the Commission's prescription.[46] The damages amounts claimed by individual complainants from the various defendants based on this measure are set forth in Appendix C.

21. The complainants add that the defendants' claims that complainants have failed to allege and prove violations of the Act and actual damage as a result of those violations are unfounded. The complainants maintain that they have successfully shown injury and causation arising from their payment of excessive rates for services purchased from the defendants during the relevant period.[47] The complainants assert that their damages are the excessive charges that they paid.

22. Finally, the complainants contend that the defendants' offset claims should be rejected because the standard of damages is statutorily based and any reduction in the full amount to which complainants are legally entitled is beyond the Commission's authority.[48] The complainants contend that offsets are in the nature of counterclaims, and as such, are not within the Commission's jurisdiction because they would involve the determination of a carrier's rights against a customer.[49] The complainants argue that offsets would violate the "filed rate doctrine" because defendants would, in effect, be allowed to recoup undercharges through retroactive rate adjustments. The complainants also claim that allowing defendants to offset their underearnings would be unreasonably discriminatory. This is so, the complainants argue, because customers against whom offsets are allowed pay more for the services purchased from defendants than non-complaining customers. The complainants argue that such action violates the policy of nondiscrimination, one of the core values protected by the prohibition against retroactive ratemaking.[50] MCI adds that defendants' offset arguments should be rejected because the Commission has already held that cross-subsidies in earning categories are not allowed.[51]

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46 See, e.g., MCI Br. at 7-8, File No. E-93-125; WilTel Br. at 7, File No. E-93-129; Cable & Wireless Br. at 7, File Nos. E-93-104--112 citing Louisville & Nashville R. Co. v. Sloss-Sheffield Steel & Iron Co., 269 U.S. 217, 235 (1925); Southern Pacific Co. v. Darnell-Taenzer Co., 245 U.S. 531 (1918); Hughes Sports Network v. AT&T, 34 FCC 2d 691, 693-94 (1972), recon. denied, 38 FCC 2d 1052 (1972).

47 See, e.g., Call-America Br. at 8, File No. E-93-151; AMNEX Br. at 7-8, File No. E-93-117.

48 See, e.g., LDDS Br. at 8 n.3, File Nos. E-93-113--116.

49 See, e.g., MCI Br. at 10-11, File No. E-93-125; LDDS Br. at 5-6 & n.3, File No. E-93-120.

50 See, e.g., MCI Br. at 14-16, File No. E-93-133; Cable & Wireless Br. at 10 n.6, File Nos. E-93-104--112.

51 See, e.g., MCI Br. at 10, File No. E-93-138.

23. The defendants challenge the complainants' damages claims on a number of grounds, raising several arguments that were previously considered and rejected by the Commission in the MCI Liability Order and the MCI Damages Order. The defendants contend that by simply basing their damages claims on a calculation of their prorated share of each of the defendants' category-level overearnings, the complainants ask the Commission to award them damages in the same amounts they would have received under the automatic refund rule invalidated by the court in AT&T v. FCC. The defendants maintain that such a result is expressly precluded by AT&T v. FCC as well as the court's decision in Ohio Bell.[52]

24. The defendants next contend that, even if AT&T v. FCC and Ohio Bell do not preclude an award of damages, the complainants' damages claims still fail because the complaints do not establish a valid cause of action. According to the defendants, to pursue a damages claim, the complainants must first show that the defendants charged unjust and unreasonable rates for interstate access services during the period in question, not that the defendants' rates produced excessive returns in individual service categories.[53] Moreover, the defendants argue, Section 206 of the Act[54] requires that complainants prove injury, causation, and the specific amount of damages sought, in addition to establishing a violation of the Act.[55] The defendants maintain that by simply referencing the defendants' earned rates of return for individual access service categories, the complainants have not only failed to allege any facts that would establish that the defendants' rates were unjust and unreasonable during the period in question, but have also failed to show that they sustained actual damage as a result of those rates.[56]

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52 See, e.g., Ameritech Br. at 13, E-93-133. Several defendants contend that Ohio Bell and Virgin Islands Tel. Corp. v. FCC, 989 F.2d 1231 (D.C. Cir. 1993) (Vitelco) make clear that it was the end result of the automatic refund mechanism, not the mechanism itself, that was unlawful. See, e.g., Pacific Br. at 4, File No. E-93-129.

53 See, e.g., CBT Br. at 11, File No. E-93-135; USWC Br. at 6-7, File No. E-93-151.

54 See 47 U.S.C. § 206.

55 See, e.g., NYT Br. at 10-12, File No. E-93-119; Pacific Br. at 13, File No. E-93-117.

56 See, e.g., NYT Br. at 10-12, File No. E-93-119; GTE Br. at 3, File Nos. E-93-104--112. The defendants contend that in construing Sections 15(8)(a) and 13(1) of the Interstate Commerce Act (the IC Act) the Supreme Court established the principle that complainants must prove they were damaged and in what amount. Southern Ry. Co. v. Seaboard Allied Milling Corp., 442 U.S. 444, 454-55 (1979) (Seaboard). Section 204 of the Act parallels Section 15(8)(a) of the IC Act and Section 208 of the Act parallels Section 13(1) of the IC Act. In Seaboard, the Court stated:

> [O]ur sole concern is the Commission's decision not to investigate under § 15(8)(a), a decision that has only two final consequences. First, the burden of proof with

25. Several defendants also contend that an award of damages to the complainants based on carrier overearnings is inappropriate for equitable and policy reasons.[57] In addition, USWC argues that an award of damages to the complainants would reward the complainants for engaging in unlawful conduct, i.e., the provision of untariffed interstate access service in violation of Section 203 of the Act.[58] USWC also contends that an award of damages here would punish USWC for operating more efficiently than anticipated when USWC filed its tariffs. USWC contends that it "did not spend enough money in 1989-90 to keep its reported return low enough to satisfy the FCC's prescription."[59]

26. USWC also argues that the defendants are not entitled to damages because USWC has already made them whole by virtue of an industry-wide settlement of 1989-1990 overearnings.[60] According to USWC, it entered into settlement agreements with practically every carrier filing an overearnings complaint for the 1989-1990 monitoring period. As a component of its settlement agreements, USWC filed a petition to permanently reduce its price cap index (PCI).[61] USWC contends that this

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> regard to reasonableness is placed on the shipper under § 13(1) rather than on the carrier, who would have borne it in a § 15(8)(a) proceeding. (With respect to all other aspects of lawfulness, however, the burden is borne by the shipper in both proceedings.) Second, the shipper's relief, if unlawfulness is proved, is limited under § 13(1) to actual damages rather than the full refund of overcharges available under § 15(8)(a).

The defendants contend that this ruling has been found applicable to proceedings under Sections 204 and 208 of the Act. See Aeronautical Radio, Inc. v. FCC, 642 F.2d 1221, 1235 n.34 (D.C. Cir. 1980), cert. denied, 451 U.S. 920 (1981). Here too, as the Commission determined in the MCI Damages Order, the defendants' reliance on case precedent is misplaced. MCI Damages Order, 8 FCC Rcd at 1522 n.60.

57 See, e.g., Ameritech Br. at 15, File No. E-93-133; USWC Br. at 10-14, File No. E-93-151.

58 USWC Br. at 14-15, File No. E-93-123; USWC Br. at 14-15, File No. E-93-151.

59 See, e.g., USWC Br. at 16, File No. E-93-151.

60 Id. at 16-19.

61 Id. USWC's Petition for Permanent Price Cap Index Reduction was only recently granted with conditions by the Common Carrier Bureau. Petition for Authority To Make Permanent Price Cap Index Reduction, DA 94-1297 (Com.Car.Bur. Nov. 23, 1994). USWC claims that, subsequent to the filing of this petition, it reduced its rates to reflect the impact of its proposed PCI reduction. Because USWC's PCI adjustment was only recently authorized, however, it would be premature to decide here whether any rate reduction USWC has made, or chooses to make, accurately reflects its PCI reduction.

PCI adjustment fully satisfies all liability for overearnings complaints, including any liability for those complaints that have not been settled and remain before the Commission for resolution in this proceeding.

27. Some defendants further contend that the complainants' claims for damages are flawed because the complainants would receive windfalls if they have passed the "overcharges" on to their customers and are now awarded damages.[62] These defendants argue that had their access charges to the complainants been lower in 1989-1990, it is almost certain that the complainants' rates to their customers would have been lower.[63]

28. The majority of the defendants argue that even if the Commission determines that damages are lawful and appropriate, any damages award to the complainants based on overearnings must be reduced to the extent that the complainants purchased services from the defendants in other access categories that produced underearnings.[64] The defendants argue that a damages award that did not take into account the substantial benefits realized by the complainants through their purchase of services at unreasonably low rates, would give complainants a windfall profit that would be inconsistent with sound principles of equity. EATEL further contends that its maximum liability to all carriers should be limited to the amount of its total overearnings in the two service categories for which it exceeded our prescribed rate of return.[65] According to EATEL, the Commission has already granted AT&T a damages award in a separate proceeding and should MCI's damages award be calculated as MCI suggests, EATEL will be required to pay 100.05 percent of its total liability for category overearnings to only 81.99 percent of its customers (the percentage of service purchased by AT&T and MCI).[66]

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62 See, e.g., Ameritech Br. at 16, File No. E-93-122; CBT Br. at 14, File No. e-93-120.

63 See e.g., NYT Br. at 12, File No. E-93-119; Pacific Br. at 15, File No. E-93-117.

64 BellSouth Br. at 5, File No. E-93-121; CBT Br. at 12-13, File No. E-93-120; GTE Br. at 5, File Nos. E-93-104--112; NYT Br. at 12-13, File No. E-93-119; Sprint Br. at 3, File No. E-93-115; SWBT Br. at 4, File No. E-93-138. CBT contends that offsets from other monitoring periods should be considered in determining the amount of damages to which complainants are entitled. CBT Br. at 12 n.29, File No. E-93-135.

65 EATEL RBr. at 11-13, File No. E-93-134.

66 Id. BellSouth made a similar argument in its answer to the complainants' original complaints but did not repeat the argument in either its briefs or reply briefs. See BellSouth Answer at 5, File No. E-93-121. The Commission previously considered and rejected BellSouth's argument in ACC Long Distance Corp. v. New York Tele. Co., 9 FCC Rcd 1659, 1665 (1994).

b. Discussion

29. Judicial Precedent: The defendants' claims that the holdings in AT&T v. FCC, Ohio Bell, and Illinois Bell control these proceedings and bar awards of damages based on earnings in excess of prescribed rate of return were previously raised by several of these same defendants and discussed at length in the MCI Liability Order and the MCI Damages Order (jointly "MCI Orders").[67] We find these arguments to be without merit for the reasons stated in the MCI Orders. The court in Vitelco ruled only on the issue of whether the Commission could, in the context of a Section 204 investigation, find rates unjust and unreasonable when they had been in effect for only six months of the designated 24 month review or monitoring period.[68] Not only does the instant proceeding not involve our authority under Section 204 of the Act, but also, unlike the monitoring period in Vitelco, the rate of return monitoring period at issue here is the full two-year monitoring period established in our rate of return regulations.

30. Section 201(b) of the Act: The defendants' contentions that the complainants' damages claims must be dismissed because the complainants have failed to prove that the defendants' rates were unjust and unreasonable within the meaning of Section 201(b) of the Act are without merit. In addressing liability above, we held that the complainants met their burden of establishing that the defendants violated our rate of return prescription thereby making their rates unlawful under Section 201(b) of the Act.[69]

31. Also without merit is the defendants' claim that even if the complainants have shown that the defendants' rates were unjust and unreasonable, their damages claims must still fail because judicial precedent requires the complainants to establish what a just and reasonable rate would have been as a prerequisite to recovering damages. This argument was previously considered and rejected in the MCI Damages Order.[70] The complainants have shown that they purchased services from

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67 See MCI Liability Order, 5 FCC Rcd at 221-23; MCI Damages Order, 8 FCC Rcd at 1524-25. Similarly, New England Tel. and Tel. Co. v. FCC, 826 F.2d 1101 (D.C. Cir. 1987) cert. denied, 490 U.S. 1039 (1989), does not bar an award of damages in these proceedings. See MCI Liability Order, 5 FCC Rcd 222-23.

68 Vitelco, 989 F.2d at 1237-40.

69 In the MCI Liability Order, the Commission held that the complainant could prove that the defendants' rates were unjust and unreasonable by proving that the defendants violated our rate of return prescription. See MCI Liability Order, 5 FCC Rcd at 226.

70 See MCI Damages Order, 8 FCC Rcd at 1525, para. 29. The Commission emphasized in that decision the Commission's authority to prescribe and enforce carriers' rates of return. The Commission also pointed out that the issue in these rate of return complaint proceedings is not whether individual rates are unlawful, but whether cumulative rates that produced earnings over and above a prescribed rate of return are unjust and unreasonable. Accordingly, the Commission

the defendants at rates that produced earnings over and above the defendants' prescribed levels. The defendants, faced with the prospect of damages for violations of a binding rate of return prescription, cannot disavow the substantial flexibility afforded carriers to achieve their authorized rate of return. In effect, the defendants would have us require the complainants to do what the defendants were neither required nor apparently able to do, that is, establish the precise rates required to bring the defendants' earnings within authorized levels for each of their interstate access service categories. This is an unreasonable requirement to impose upon complainants. Although the Commission's rate of return prescription afforded the defendants considerable leeway in setting their rates, it also bound the defendants to a maximum earnings limitation. The Commission previously determined in the MCI Liability Order that a violation of such a prescription constitutes a violation of the Act for which damages may lie. It is therefore appropriate and consistent with the Commission's rate of return regulatory scheme to look at earnings in excess of the Commission's prescribed rates of return as a starting point for assessing the complainants' damages claims.

32. Damages and Offsets: The defendants' arguments are devoted primarily to attempting to persuade the Commission that the complainants' damages claims are really claims for restitution or refunds governed by equitable or public policy considerations. These considerations, according to the defendants, militate against any award of damages to the complainants based on excessive earnings. The defendants argue, in effect, that the damages the complainants seek are equivalent to refunds that would have been required under the refund mechanism invalidated by the court in AT&T v. FCC. We do not agree. We are concerned here with determining whether a particular customer, one that has availed itself of a statutory complaint remedy under Title II of the Act, has sustained any measurable damage that can be traced to the defendants' violations of the Act. Although a damages award under Section 208 of the Act might well be equal or substantially similar to a refund ordered under Section 204 of the Act,[71] this does not transform a private complaint action into

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held that the Bureau had properly determined that it is appropriate, in measuring the damage caused by the defendants' rate of return violations, to look at the difference between the amount the complainants paid for the defendants' interstate access services and the amount they would have paid if the defendants had charged rates that produced returns within the Commission's prescribed levels. See also MCI Liability Order, 5 FCC Rcd at 222-23 (discussing the Commission's authority under the Act to prescribe and enforce common carriers' rates of return).

71 See Seaboard, 442 U.S. at 455 n.8:

> If a shipper proves a rate is unreasonable and that he was damaged in the full amount he was overcharged, the outcome of a § 13(1) [parallel with § 208 of the Act] proceeding will be no different than that of a § 15(8)(a) [parallel with § 204 of the Act] proceeding in which the carrier fails to establish the reasonableness of the rate.

a public enforcement proceeding subject to broad public interest considerations.

33. Consistent with our decisions in the MCI Damages Order and AT&T Damages Order, we find the defendants' arguments with respect to "passing-on" to be equally unavailing. In rejecting this same argument, the Commission said, "[w]hether [complainant] passed on the overcharges or absorbed them does not alter the fact that the defendants overcharged [complainant] in violation of a binding rate of return prescription and must answer for such violations."[72] The issue is not what the complainants have done in response to paying excessive rates, but whether the complainants have been damaged as a result of these excessive rates.

34. We also reject the defendants' other equitable arguments regarding impermissible windfall profits to the complainants if damages are awarded. The defendants' arguments in this regard, along with the numerous Commission and judicial precedents relied upon by the parties, were addressed in detail in the MCI Damages Order[73] and require no further discussion here. In addition, the Commission has previously rejected USWC's equitable arguments regarding the defendants' provision of untariffed service and USWC's operation efficiencies and they require no further discussion here.[74] Regarding USWC's petition for a permanent reduction in its price cap index, we note that the petition was recently granted by the Common Carrier Bureau (the "Bureau") with conditions. The Bureau held that granting USWC's petition would not constitute an "industry-wide" settlement of USWC's rate of return violations for the 1989-1990 monitoring period and therefore would have no effect on non-settling and future complainants.[75] We also reject the contention that a voluntary PCI reduction made as part of settlement agreements with parties who are not participating in these proceedings should be allowed either to extinguish or to limit the rights of the complainants here.[76]

35. We do find, however, that certain of the defendants have made persuasive claims for offsets based on the complainants' purchases of access services in categories in which the defendants realized earning shortfalls during the period in question. At the outset, we note that the Commission has previously rejected the defendants' claims that the Commission is required to take into account a carrier's interstate access underearnings as well as its overearnings in determining whether a violation of the Act has occurred sufficient to sustain a complaint of

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72 MCI Damages Order, 8 FCC Rcd at 1526, para. 31; see also AT&T Damages Order, 8 FCC Rcd at 1020, para. 21.

73 8 FCC Rcd at 1526, para. 33.

74 See LiTel Telecommunications Corp. v. U S West Communications, Inc., 9 FCC Rcd 1619, 1623 n.36 (1994).

75 Petition for Authority To Make Permanent Price Cap Index Reduction, DA 94-1297 (Com.Car.Bur. Nov. 23, 1994).

76 See New York State Dept. of Law v. FCC, 984 F.2d 1209, 1219-20 (D.C. Cir. 1993).

damages under Section 208 of the Act.[77] We note, however, that the Commission has similarly rejected arguments that it lacks discretion under Section 208 to consider a complainant's overall purchase of interstate access services from a defendant in assessing the damage or injury to that complainant.[78] The courts have made clear that carriers assume the risk of both losses for services they underprice and the prospect of returning amounts realized through rates that are unjustly or unreasonably high.[79] We also maintain our view that a carrier may properly be required to make whole those who have been injured by unlawful rates and practices without regard to whether the carrier has achieved its authorized rate of return overall.[80] Nevertheless, we believe it appropriate for purposes of assessing the complainants' damages claims to examine fully the complainants' purchase of interstate access services from the respective defendants during the monitoring period covered by the complaints.

36. Significantly, the complainants do not dispute that, in their purchases of interstate access services from the defendants, they benefitted substantially from defendants' rates that produced underearnings in one or more access service categories. Thus, while we view it as a reasonable starting point to look at the difference between the amounts the complainants paid for the defendants' access services on a category basis and the amounts they would have paid if the defendants had earned at the prescribed level for the relevant category, we find it also reasonable to offset payments by the complainants that contributed to the defendants' excessive earnings to the extent that it can be shown that the complainants benefitted from the defendants' underearnings in other service categories during the relevant period.

37. In the MCI Damages Order, the Commission rejected claims that allowing offsets would somehow repeal our rate of return prescription on a category basis.[81] We emphasized that the issue presented by these complaints and contested by the defendants is the extent to which the complainants have been damaged as a consequence of the defendants' violations of a binding rate of return prescription and that the focus of the complaints is not the defendants' individual interstate access rates per se, but the excessive earnings produced by those rates and their effect on the complainants.[82] The complainants have provided no new information or arguments that would persuade us to depart from our holdings.

38. Moreover, as the Commission emphasized in the MCI Damages Order, the Commission views offsets in the complaint context as

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77 MCI Liability Order, 5 FCC Rcd at 223.

78 MCI Damages Order, 8 FCC Rcd at 1527, para. 35.

79 See MCI Liability Order, 5 FCC Rcd at 223.

80 Id.

81 MCI Damages Order, 8 FCC Rcd at 1527, para. 36.

82 Id. at 1527-28, para. 39.

appropriate only in relation to a particular complainant's purchase of access service from a defendant carrier. A defendant would not, for example, be able to rely on undercharges to a separate customer or underearnings in general to offset a damages claim based on the measures adopted here. In particular, a complainant that took service in only one access service category that overearned would not have received the benefit of a defendant's underearnings in access categories from which service was not taken.

39. We therefore reject EATEL's contention that its maximum liability to all interstate access customers must be limited to the amount of its total overearnings in the two service categories for which it earned amounts over our prescribed rate of return.[83] According to EATEL, taking into account the amount already awarded to AT&T in a prior proceeding, this amount would be exceeded if we grant MCI the damages amount it requests. We note that the complaint brought by AT&T against EATEL alleged a violation of our overall rate of return prescription that included earnings in all three service categories, common line, special access, and switched traffic sensitive. EATEL overearned in the special access and switched traffic sensitive categories but earned within the Commission's prescription for carrier common line service.[84] The rate of return for EATEL's overall interstate earnings was 15.70 percent for the 1989-1990 monitoring period. Thus, EATEL exceeded the Commission's prescribed rate of return plus buffer of 12.25 percent for overall interstate service. EATEL did not offer an alternative damages calculation or directly challenge AT&T's computation methodology or calculations.[85]

40. The issue before us in this proceeding is the amount of damages MCI incurred as a result of purchases of switched traffic sensitive services and special access services, not from overall interstate purchases. As noted above, EATEL earned 17.60 percent in the special access category and 21.37 percent in the switched traffic sensitive category. At the category level, EATEL's overearnings are the earnings in excess of 12.40 percent in each category. EATEL does not directly challenge MCI's computation methodology or calculations. As the Commission previously has held, both our prescription for overall interstate access and our prescription for access service categories are valid and enforceable prescriptions.[86] The Commission's award to AT&T is irrelevant to the amount of damages MCI has incurred. We therefore

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83 EATEL earned 17.60 percent in the special access category and 21.37 percent in the switched traffic sensitive category. Because the Commission's rate of return prescription plus buffer is 12.40 percent for each category, EATEL essentially is asserting that its total liability should be limited to amounts in excess of 12.40 percent of its earnings in these two categories or to $731,160.

84 In the common line category EATEL earned 12.19 percent.

85 American Tele. and Tele. Co. v. Central Tele. Co., 8 FCC Rcd 3546, 3554 (1993) (AT&T 1989-90 Damages Order).

86 See MCI Liability Order, 5 FCC Rcd at 223; AT&T Liability Order, 5 FCC Rcd at 148.

conclude that the damages award granted to AT&T based on overall interstate access overearnings does not bar MCI from recovering damages based on its purchases of switched traffic sensitive services and for special access services from EATEL.

41. Based upon our decision regarding the computation of damages, we award damages to the complainants as specified in Appendix C to this Memorandum Opinion and Order. In reaching the amounts specified in Appendix C, we have reviewed the damages calculations provided by both the complainants and the defendants and made adjustments to these calculations as explained in Appendix C. In addition, we accept the defendants' claims for offsets to the extent that the record shows that the complainants purchased access services from the defendants during the period in question at rates that produced earnings below the Commission's prescribed levels. We address the complainants' claims for interest on the damages amounts in the section below.

2. Interest on Damages

a. Contentions of the Parties

42. Most of the defendants claim that the complainants are not entitled to prejudgment interest should the Commission award damages to them. These defendants contend that while the Commission may award interest under Section 204 of the Act, there is no provision for the award of interest under Section 206 of the Act.[87] Because the Commission cannot lawfully grant the complainant refunds, according to these defendants, the Commission may not award interest.[88] Several defendants contend that an award of prejudgment interest is an equitable remedy and that under considerations of fairness no interest should be awarded here.[89] EATEL contends that even if complainants are awarded interest it

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87 See, e.g., USWC Br. at 9, File No. E-93-123; GTE Br. at 4, File Nos. E-93-104--112. Sprint adds that there is no contractual basis for an award of prejudgment interest either. Sprint Br. at 2, File Nos. E-93-113--116.

88 See, e.g., USWC Br. at 9, File No. E-93-123; CBT Br. at 13 n.33, File No. E-93-120.

89 See, e.g., Pacific Bell Br. at 16-17, File No. E-93-117; Ameritech Br. at 17-18, File No. E-93-133; EATEL RBr. at 14-15, File No. E-93-134. Ameritech and Pacific Bell argue that such an interest award would penalize them when there has been no accusation of deliberate wrongdoing and that an interest award is unnecessary to make the complainants whole. According to Ameritech, the complainant enjoyed benefits from paying rates for services that underearned. Pacific argues that the charges were simply passed through to the complainants' customers. Ameritech adds that because the proper calculations of damages are sharply disputed it would not be fair to make an award of interest. EATEL argues that no interest award should be made under these circumstances because it has made no attempt to delay the proceeding and has merely acted in good faith to defend its tariffed rates.

should not be compounded daily.[90] According to EATEL, daily compounding interest would enable complainants to receive far more interest than is currently available from a bank or other depository. Therefore, EATEL argues that this unusually high interest award would have the impact of penalizing EATEL for exercising its full litigation rights.

43. In responsive pleadings, the complainants generally claim that the defendants' arguments against an assessment of prejudgment interest in connection with any ultimate award of damages have already been considered and rejected by the Commission.[91] MCI contends that an award of prejudgment interest is appropriate in this proceeding because interest is typically awarded in overcharge cases under the Act in order to make the injured party whole, and has been awarded in similar complaint proceedings before the Commission.[92] WilTel adds that an interest award would not violate principles of fairness because defendants had ample opportunity to properly set and adjust their rates and that the defendants' contentions that complainants passed through the excessive charges to their customers does not shift the equities in the defendants' favor.[93]

b. Discussion

44. The defendants' claims that the Commission lacks authority to award interest in a Section 208 common carrier complaint proceeding are incorrect. Although Section 208 of the Act does not explicitly authorize an award of interest, our authority under Section 4(i)[94] to award interest in a common carrier complaint case is well established.[95] In deciding whether to award interest in a particular common carrier complaint case we are generally guided by federal court practice, where the award of prejudgment interest "is a matter left to the sound discretion of the trial court."[96] The award of interest in a common carrier complaint case is thus guided by considerations of fairness. Applying this standard, we are persuaded that an award of interest is appropriate in these cases. The complainants were effectively deprived of the use of the excessive amounts they paid the defendants as a result of the defendants' unlawful rates. The defendants, on the other hand, enjoyed the beneficial use, for a substantial period of time, of funds to which the complainants

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90 EATEL RBr., File No. E-93-134, at 15-16.

91 See, e.g., Call-America RBr., File No. E-93-151, at 2-3; Cable & Wireless RBr., File Nos. E-93-104--112, at 2.

92 See, e.g., MCI RBr. at 26-28, File No. E-93-133.

93 WilTel Br. at 15-16, File No. E-93-129.

94 47 U.S.C. § 154(i).

95 See MCI Telecommunications Corp. v. American Tel. and Tel. Co., 94 FCC 2d 332, 343-46 (1983).

96 United States v. California Board of Equalization, 650 F.2d 1127, 1132 (9th Cir. 1981), aff'd, 456 U.S. 901, reh'g denied, 456 U.S. 985 (1982).

rightfully have claims. We are persuaded that interest is required not only to effect a full and fair remedy for the complainants, who paid rates higher than they would have paid had the defendants earned within the prescribed levels, but also to avoid any unjust enrichment of the defendants stemming from their charging rates that we have determined to be unjust and unreasonable under Section 201(b) of the Act.[97]

45. Regarding the rate and methodology to be used in calculating interest, in previous rate of return proceedings the Commission adopted a policy of awarding daily compounded interest computed at the IRS rate for tax overpayments.[98] We are persuaded that daily compounded interest more fairly compensates aggrieved parties for the value of money owed. The defendants have provided no new arguments that would compel us to alter our previous determination, and we therefore reject their claims. We find that interest on the damages awarded here from each of the defendants should be computed at the IRS rate for tax refunds, compounded daily, from January 1, 1991, the day after the relevant 1989-1990 rate of return monitoring period ended, until the date full payment is made to each of the complainants.[99]

IV. PROCEDURAL MATTERS

46. Cable & Wireless filed a motion to supplement the record regarding damage calculations in File Nos. E-93-104--112 and in response GTE filed a motion to supplement the record in the same proceedings. In the interest of assuring a full record in this matter, we grant the parties' motions to supplement the record. Ameritech filed motions to withdraw their motions to compel in File Nos. E-93-122 and E-93-133. The motions were unopposed and we will grant Ameritech's motions. Sprint filed a motion for leave to file its reply brief out of time in File Nos. E-93-113--116. The motion was unopposed and we will grant Sprint's motion.

47. EATEL requests a hearing before an administrative law judge to resolve the issues raised in the complaint against it. EATEL states that under the Fifth Amendment it cannot be deprived of property without due process.[100] EATEL has provided no persuasive authority to support its claim that it is entitled automatically to a hearing before an administrative law judge to resolve questions concerning damages. Section 208 of the Act does not mandate any particular form of procedure

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97 See New England Tel. & Tel. Co. v. FCC, 826 F.2d 1101, 1113 (D.C. Cir. 1987), cert. denied, 490 U.S. 1039 (1989) (carriers may reasonably be required "to pay full interest for earnings they had no right to retain in the first place.").

98 See Competitive Telecommunications Ass'n v. The Chesapeake and Potomac Tel. Cos., 8 FCC Rcd 5550, 5553, at para. 15 (1993) and Section 208 Complaints Alleging Violations of the Commission's Rate of Return Prescription for the 1987-1988 Monitoring Period, 8 FCC Rcd 5485, 5495 at para. 42 (1993).

99 The applicable IRS rates are set forth in Appendix D.

100 EATEL Answer at 10, File No. E-93-134.

in complaint cases: When Section 208 is construed in conjunction with the Act's general procedural authorization in Section 154(j), it is abundantly clear that the decision of when trial-type hearings are necessary under Section 208 is one which lies within the discretion of the Commission, or by the Bureau acting pursuant to delegated authority.[101] With respect to constitutional due process, the Fifth Amendment does not require a trial-type hearing where the disagreement is not factual but rather is over the legal conclusion to be drawn from the facts.[102] Here there are no material disputed questions of fact at this stage of these proceedings; the issues are legal, not factual, in nature and thus no administrative hearing is required.

48. USWC alleges that it has been denied significant procedural rights in these proceedings.[103] Specifically, USWC contends that the Bureau improperly denied its motions to compel answers to certain interrogatories. USWC repeats the interrogatories and offers a statement regarding the relevance of the interrogatories. USWC offers no new rationale that would compel the Commission to reverse the Bureau's finding[104] that in every instance the requested interrogatories are not relevant to our determination of the issues raised in these proceedings nor are they reasonably calculated to lead to the discovery of admissible evidence. USWC also contends that it has been denied due process because the Bureau has acted as prosecutor, decision maker and advisor to the Commission. As the Commission has noted in prior proceedings, we disagree with USWC's characterization of the Bureau's activities regarding these complaint proceedings. At all times covered by USWC's allegations, the Bureau has been acting as the "decision maker" and not as a prosecutor.[105]

V. CONCLUSION

49. We have carefully reviewed the extensive record before us and have found, to the extent indicated here, that the complainants are entitled to awards of damages, plus accumulated interest, compounded daily, on such damages, for the defendants' violations of the

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101 See, e.g., Comark Cable Fund III, 100 FCC 2d 1244, recon. denied, 103 FCC 2d 600, temporarily stayed, 104 FCC 2d 451 (1985), remanded for clarification sub nom. Northwestern Indiana Tele. Co. v. FCC, 824 F.2d 1205 (D.C. Cir. 1987), clarified on remand, 3 FCC Rcd 3096 (1988), pet. for review denied, 872 F.2d 465 (D.C. Cir. 1989), cert. denied, 493 U.S. 1035 (1990).

102 See Northwestern Indiana Tele. Co. v. FCC, 824 F.2d 1205, 1210 (D.C. Cir. 1987).

103 USWC Br. at 19-21, File No. E-93-123; USWC Br. at 20-22, File No. E-93-151.

104 The Bureau issued letters memorializing staff rulings made during a telephone conference with the parties to the proceedings. See Letter dated March 18, 1994, File No. E-93-123; Letter dated March 18, 1994, File No. E-93-151.

105 See AT&T 1989-90 Damages Order, 8 FCC Rcd at 3548 n.19.

Commission's rate of return prescription for the 1989-1990 monitoring period.

VI. ORDERING CLAUSES

50. Accordingly, IT IS ORDERED, pursuant to Sections 4(i), 4(j), 201, 206, 207, 208, and 209 of the Communications Act, as amended, 47 U.S.C. §§ 154(i), 154(j), 201, 206, 207, 208, and 209, that the complaints identified in Appendix A to this Memorandum Opinion and Order ARE GRANTED to the extent indicated above and otherwise ARE DENIED.

51. IT IS FURTHER ORDERED that the defendants identified in Appendix C to this Memorandum Opinion and Order SHALL PAY to the complainants identified in Appendix C the amount specified therein within 60 days after the release date of this Memorandum Opinion and Order.

52. IT IS FURTHER ORDERED that the defendants identified in Appendix C SHALL PAY to the complainants identified in Appendix C interest, compounded daily, on the damages specified there computed at the IRS rates set forth in Appendix D from January 1, 1991 until the date full payment is made.

53. IT IS FURTHER ORDERED that the procedural motions described in paragraph 44 above ARE GRANTED to the extend indicated there and otherwise ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

APPENDIX A

AMERICAN NETWORK EXCHANGE, INC., (AMNEX) et al., filed a complaint against:

PACIFIC BELL (Pacific)	File No. E-93-117

CABLE & WIRELESS, INC., (Cable & Wireless) et al., filed complaints against:

GTE CALIFORNIA[1]	File No. E-93-104
GTE FLORIDA[1]	File No. E-93-105
GTE NORTH - INDIANA[1]	File No. E-93-106
GTE NORTH - MICHIGAN[1]	File No. E-93-107
GTE NORTH - MISSOURI[1]	File No. E-93-108
GTE NORTH - WISCONSIN[1]	File No. E-93-109
GTE NORTHWEST[1]	File No. E-93-110
CONTEL WEST RATE GROUP[1]	File No. E-93-111
CONTEL EAST/SOUTH RATE GROUP[1]	File No. E-93-112
NEW YORK TELEPHONE COMPANY (NYT)	File No. E-93-119
BELLSOUTH TELECOMMUNICATIONS, INC. (BellSouth)	File No. E-93-121
AMERITECH TELEPHONE OPERATING COMPANIES (Ameritech)	File No. E-93-122
U S WEST COMMUNICATIONS, INC. (USWC)[2]	File No. E-93-123

KLP, INC., d/b/a CALL-AMERICA (Call-America) filed a complaint against:

U S WEST COMMUNICATIONS, INC. (USWC)[2]	File No. E-93-151

LDDS COMMUNICATIONS, INC., d/b/a LDDSMETROMEDIA COMMUNICATIONS (LDDS) filed complaints against:

UNITED TELEPHONE COMPANY OF FLORIDA[3]	File No. E-93-113
UNITED TELEPHONE SYSTEM - MIDWEST[3]	File No. E-93-114
CENTEL - TEXAS[3]	File No. E-93-115
CENTEL - VIRGINIA[3]	File No. E-93-116
CINCINNATI BELL TELEPHONE COMPANY (CBT)	File No. E-93-120

MCI TELECOMMUNICATIONS CORPORATION (MCI) et al., filed complaints against:

NEW YORK TELEPHONE COMPANY (NYT)	File No. E-93-125
BELLSOUTH TELECOMMUNICATIONS, INC. (BellSouth)	File No. E-93-127
AMERITECH OPERATING COMPANIES (Ameritech)	File No. E-93-133
EAST ASCENSION TELEPHONE COMPANY (EATEL)	File No. E-93-134
CINCINNATI BELL TELEPHONE COMPANY (CBT)	File No. E-93-135
SOUTHWESTERN BELL TELEPHONE COMPANY (SWBT)	File No. E-93-138

WILTEL, INC., (WilTel) filed a complaint against:

PACIFIC BELL (Pacific)	File No. E-93-129

FOOTNOTES

[1] These companies are collectively referred to as the GTE Companies.

[2] Northwestern Bell Telephone Company, Mountain States Telephone and Telegraph Company, and Pacific Northwest Bell Telephone Company have consolidated. See The Mountain States Tele. and Tele. Co., Northwestern Bell Tele. Co., and Pacific Northwest Bell Tele. Co., 5 FCC Rcd 1982 (1990). U S West Communications, Inc. is the remaining company.

[3] These companies are collectively referred to as the Sprint Companies.

APPENDIX B

1989-1990 Rates of Return

Company	Inter-state	Common Line	Special Access	Switched Traffic Sensitive
Ameritech Oper. Cos.	12.21	12.35	14.37	11.25
BellSouth Tel. Co.	12.14	11.96	10.86	12.99
Cincinnati Bell Tel. Co.	11.52	11.53	8.53	13.19
Centel - Texas	13.16	10.88	8.05	19.86
Centel - Virginia	11.95	11.11	23.49	11.58
Contel East/South	11.10	11.69	16.22	9.14
Contel West	12.53	11.69	19.69	13.49
East Ascension Tel. Co.	15.70	12.19	17.60	21.37
GTE California	11.76	10.94	9.48	13.70
GTE Florida	11.66	10.93	10.03	13.66
GTE North - Indiana	12.19	10.93	13.96	12.95
GTE North - Michigan	12.52	10.97	25.91	13.39
GTE North - Missouri	12.04	10.94	12.51	13.62
GTE North - Wisconsin	12.76	10.95	13.49	15.14
GTE Northwest	12.41	10.94	11.07	14.37
Pacific Bell	12.70	11.61	12.83	14.39
New York Tel. Co.	11.59	10.04	9.00	13.35
Southwestern Bell Tel. Co.	11.73	12.04	12.44	10.96
United Tel. Co. of Florida	11.97	11.47	8.12	13.58
United Tel. System - Midwest	12.42	12.07	5.67	14.08
U S WEST Commun.	12.75	12.04	13.25	13.40

APPENDIX C

AMERITECH

[amounts in dollars]

Complainant	DAMAGES	OFFSETS	DAMAGES AWARD
Cable & Wireless[1] E-93-122	65,035[2]	(173,041)[3]	-0-
MCI E-93-133	3,769,150[4]	(4,668,150)[5]	-0-

NOTES FOR AMERITECH

1. Teledial America, Inc., LDDS Communications, Inc., and Schneider Communications, Inc., which were originally complainants in File No. E-93-122, settled their claims against defendant and were dismissed from this proceeding pursuant to joint motions of the parties. Cable & Wireless, Inc. v. Ameritech, 9 FCC Rcd 1268 (Com. Car. Bur. 1994). Cable & Wireless, Inc. v. Ameritech, 9 FCC Rcd 1392 (Com. Car. Bur. 1994); Cable & Wireless, Inc. v. Ameritech, 9 FCC Rcd 3202 (Com. Car. Bur. 1994). Complainant Cable & Wireless is the sole remaining complainant in File No. E-93-122.

2. Both complainant Cable & Wireless's and defendant's damages calculations result in damages amounts that vary only slightly. Defendant calculates damages as $65,046 without interest while complainant Cable & Wireless calculates damages as $65,035 without interest. Because complainant Cable & Wireless has the burden of proof, we accept its lower damages calculation.

3. Defendant appears to calculate offsets for the traffic sensitive category using the category target rate of return plus buffer of 12.40 percent. We note that the target rate of return of 12.00 percent is correctly used to calculate offsets because a defendant cannot be said to have underearned to the extent its earnings exceed the target rate of return. See, e.g., Allnet Communication Services, Inc. v. U S West, Inc., 8 FCC Rcd 3017, 3023 n.63 (1993). Complainant calculates offsets using 12.00 percent. Therefore, we accept complainant Cable & Wireless's offset calculation.

4. Complainant MCI and defendant both provide damages calculations. In its damages calculations, complainant MCI purports to use a "carrier market share" figure provided by defendant. MCI Br. at Schedule 1, n.9. However, the figure used by complainant MCI is not the same as that provided by defendant. Complainant MCI's and defendant's calculations appear to be the same in other respects, including purchase amounts and tax adjustment factors. There would be no dispute between the parties regarding the amount of damages to be awarded had the figure provided by the defendant been used by MCI as MCI represented it had. Therefore, we accept defendant's damages calculation.

5. A heading in defendant's offset calculations indicates that defendant erroneously based its switched traffic sensitive category underearnings calculations on the category target rate of return plus buffer of 12.40 percent. As the actual figures suggest and as suggested in complainant's explanation of its calculations, however, defendant correctly used the target rate of return of 12.00 percent to calculate offsets. Complainant MCI provides no offset calculations and does not object to those provided by defendant. Therefore, we accept defendant's offset calculations.

BELLSOUTH

[amounts in dollars]

Complainant	DAMAGES	OFFSETS	DAMAGES AWARD
LDDS E-93-121	1,216,257[1]	(943,361)[2]	272,896
Cable & Wireless E-93-121	93,739[1]	(58,338)[2]	35,401
MCI E-93-127	4,771,448[3]	4,202,349[4]	569,099

NOTES FOR BELLSOUTH

1. With regard to switched traffic sensitive category overearnings, complainants LDDS and Cable & Wireless stipulate to defendant's methodology, purchase amount, and damages amount contained in defendant's responses to these complainants' interrogatories except for defendant's attempts to adjust its calculations to reflect its aggregate over- and under- earnings. Complainants LDDS and Cable & Wireless state that the stipulated calculations appear consistent with the way damages are calculated in rate of return complaint proceedings. LDDS Br. at 6-7, File No. E-93-121. Defendant includes the same damages calculation, without the "aggregate" adjustment, in its brief. Therefore, we accept the damages calculations to which complainants LDDS and Cable & Wireless stipulate.

2. Complainants LDDS and Cable & Wireless provide no offset calculations, but object to defendant's offset calculations contained in defendant's initial brief because of the "aggregate" adjustment described in note 1 above. LDDS RBr. at 3. We note that defendant did not include the "aggregate" adjustment in its briefs and computed offsets using the methodology to which complainants LDDS and Cable & Wireless stipulated. Therefore, we accept defendant's offset calculations contained in its initial brief.

3. Both complainant MCI and defendant derived damages amounts of $4,771,448.

4. Complainant MCI does not provide offset calculations and does not object to defendant's calculations. Therefore, we accept defendant's offset amount of $4,202,349.

CINCINNATI BELL

[amounts in dollars]

Complainant	DAMAGES	OFFSETS	DAMAGES AWARD
LDDS E-93-120	3,588[1]	(2,504)[1,4]	1,084
MCI E-93-135	174,418[2]	(480,493)[3,4]	-0-

NOTES FOR CINCINNATI BELL

1. Although the parties disputed the amount of complainant LDDS's purchases in their initial briefs, complainant LDDS states in its reply brief that the amounts it proffered in its initial brief "may not accurately reflect its access purchases from the Defendant during the relevant monitoring period," and states that the damages calculation methodology used by defendant appears consistent with the way damages are calculated in rate of return complaint proceedings. Complainant LDDS then stipulates to defendant's damages calculation for the switched traffic sensitive category contained in defendant's initial brief. LDDS RBr. at 4, File No. E-93-120. Therefore, we accept defendant's calculation of damages for the switched traffic sensitive category. We also accept the purchase amounts proffered by defendant for the common line and special access categories based on complainant LDDS's statement that the purchase amounts it proffers may be inaccurate.

2. Both complainant MCI and defendant derive damages amounts of $174,418.

3. Complainant MCI provides no offset calculations.

4. Defendant calculates offsets for the common line and special access categories using the category target rate of return plus buffer of 12.40 percent. We note that the target rate of return of 12.00 percent is used to calculate offsets correctly because a defendant cannot be said to have underearned to the extent its earnings exceed the target rate of return. See, e.g., Allnet v. U S West, 8 FCC Rcd at 3023 n.63. We have recalculated offsets using 12.00 percent.

EAST ASCENSION TELEPHONE COMPANY, INC.

[amounts in dollars]

Complainant	DAMAGES[1]	OFFSETS[2]	DAMAGES AWARD
MCI E-93-134	35,532	-0-	35,532

NOTES FOR EAST ASCENSION TELEPHONE COMPANY, INC.

1. A heading in complainant's damages calculations indicates that complainant erroneously based its category overearnings calculations on the overall target rate of return plus buffer of 12.25 percent. However, as the actual figures suggest and as clarified in complainant's explanation of its calculations, complainant correctly used the category target rate of return plus buffer of 12.40 percent.

2. Defendant overearned in the special access and switched traffic sensitive categories, and earned within the authorized range of 12.00 percent to 12.40 percent in the common line category. Therefore, there are no offsets in this proceeding. See MidAmerican Long Distance Co. v. Pacific Bell, 8 FCC Rcd 1201, 1210 n.93 (1993).

GTE TELEPHONE OPERATING COS.

[amounts in dollars]

GTE California

Complainant	DAMAGES[1]	OFFSETS[1]	DAMAGES AWARD
Cable & Wireless E-93-104	62,026	(73,708)	-0-
LDDS E-93-104	104,978	(236,748)	-0-

GTE Northwest

Complainant	DAMAGES[1]	OFFSETS[1]	DAMAGES AWARD
LDDS E-93-110	106,573	(72,944)	33,629

GTE North - Indiana

Complainant	DAMAGES[1]	OFFSETS[1]	DAMAGES AWARD
Teledial America E-93-106	1,116	(2,370) [2]	-0-

GTE North - Michigan

Complainant	DAMAGES[1]	OFFSETS[1]	DAMAGES AWARD
Teledial America E-93-107	43,571	17,291	26,280

GTE North - Missouri

Complainant	DAMAGES[1]	OFFSETS[1]	DAMAGES AWARD
LDDS E-93-108	10,465	(14,468)	-0-

GTE North - Wisconsin

Complainant	DAMAGES[1]	OFFSETS[1]	DAMAGES AWARD
LDDS E-93-109	6,785	(3,293)	3,492
Schneider Commun. E-93-109	35,232	(13,600)	21,632

GTE Florida

Complainant	DAMAGES[1]	OFFSETS[1]	DAMAGES AWARD
LDDS E-93-105	450,246	(934,293)	-0-

Contel East South

Complainant	DAMAGES[1]	OFFSETS[1]	DAMAGES AWARD
LDDS E-93-112	9,123 [3]	(131,269)	-0-

Contel West

Complainant	DAMAGES[1]	OFFSETS[1]	DAMAGES AWARD
Teleconcepts, Inc. E-93-111	391 [3]	(175) [3]	216

NOTES FOR GTE OPERATING COS.

1. Complainants erroneously use the overall target rate of return plus buffer of 12.25 percent to calculate damages and offsets on a per category basis for defendants GTE Northwest, GTE North - Wisconsin, GTE North - Michigan, and Contel West. Complainants also erroneously use the overall target rate of return plus buffer of 12.25 percent to calculate offsets for defendant GTE Northwest. We note that the target rate of return plus buffer for category overearnings is 12.40 percent. The overall target rate of return plus buffer of 12.25 percent is inapplicable to overearnings calculated on a per category basis. Further, we note that the target rate of return of 12.00 percent is used to calculate offsets correctly because a defendant cannot be said to have underearned to the extent its earnings exceed the target rate of return. See, e.g., Allnet v. U S West, 8 FCC Rcd at 3023 n.63. Complainants also used erroneous composite tax gross-up factors in calculating damages and offsets for all defendants. Therefore, except as noted, we accept defendants' overearnings and offset calculations.

2. Both parties calculate an offset amount based on a negative purchase amount in the special access category, but do not explain the entry. We do not understand how a purchaser could purchase a negative amount of service. Therefore, we disregard these calculations. We note that the total damages award is zero regardless of whether this particular offset amount is included.

3. The parties dispute the amount of complainant Teleconcepts' purchases in the switched traffic sensitive and common line categories and complainant LDDS's purchases in the special access category. Complainants provide affidavits stating that the purchase amounts they provide reflect data contained in their payment records, but they do not provide copies of those records. Defendants dispute the accuracy of the amounts and argue that the affidavits provide inadequate support.

Although, as complainants note, the Commission has accepted purchase amounts supported solely by affidavits from complainants who stated that their records indicated a different purchase amount than amounts averred by defendants, the Commission did so in circumstances different from those present here. In several proceedings relating to the 1987-1988 monitoring period, the parties disputed in their briefs the amounts of service purchased by various complainants. Subsequent to the filing of reply briefs, the complainants supplemented the record by filing affidavits attesting to the accuracy of the purchase amounts they provided. See, e.g., American Network Exchange, Inc. v. Pacific Bell, File No. E-91-144. Generally, these affidavits were not contested. See Id.; compare American Network Exchange, Inc. v. Indiana Bell Telephone Company, File No. E-91-136; Section 208 Complaints Alleging Violations of the Commission's Rate of Return Prescription for the 1987-1988 Monitoring Period, 8 FCC Rcd 1876, 1900 (1993).

In this proceeding, however, defendants have contested both the purchase amounts and the reliability of the affidavits filed by complainants along with their initial briefs. Complainants have not responded to defendants' objections and have submitted no additional evidence in the form of billing records or other information to support their contentions or to rebut defendants' allegations. Therefore, we

find that complainants have not met their burden of proof regarding their purchase amounts and we will not credit the disputed purchase amounts they proffer. Complainants have the burden of proof to make their case and a duty to keep all information and supporting documentation complete and current. Section 208 Complaints Alleging Violations of the Commission's Rate of Return Prescription for the 1987-1988 Monitoring Period, 8 FCC Rcd 5485, 5494 (1993) (Reconsideration Order); see also 47 C.F.R. § 1.720(g). We note that complainants supplemented the record with information aimed at clarifying other disputes regarding damages in this proceeding, but made no attempt to supplement their claims regarding purchase amounts. In the absence of such information, we calculate damages based on the purchase amounts admitted by defendants.

We note that it is immaterial whether complainant LDDS purchased the amount of special access service it alleges because, even using its proffered purchase amounts, its damages are less than offsets and its damages award is zero.

PACIFIC BELL

[amounts in dollars]

Complainant	DAMAGES[1]	OFFSETS[1]	DAMAGES AWARD
Amnex E-93-117	6,163[1,2]	(985)[1,2]	5,178
Cable & Wireless E-93-117	408,264[1,2]	(69,824)[1,2]	338,440
LDDS E-93-117	733,770[1]	(144,553)[1]	589,217
WilTel E-93-129	87,501[3]	-0-[4]	87,501

NOTES FOR PACIFIC BELL

1. Defendant and complainants Amnex, Cable & Wireless, and LDDS use identical methodologies to calculate damages and offsets. Complainants, however, erroneously use the overall target rate of return plus buffer of 12.25 percent to calculate damages and offsets on a per category basis. We note that the target plus buffer rate for category overearnings is 12.40 percent. The overall target plus buffer rate of 12.25 percent is inapplicable to overearnings calculated on a per category basis. We note that the target rate of return of 12.00 percent is used to calculate offsets correctly because a defendant cannot be said to have underearned to the extent its earnings exceed the target rate of return. See, e.g., Allnet v. U S West, 8 FCC Rcd at 3023 n.63. Defendant uses the correct percentages. Therefore, we accept defendant's calculations.

2. The parties dispute the amount of complainant Amnex's purchases in the switched traffic sensitive and special access categories and complainant Cable & Wireless' purchases in the switched traffic sensitive category. Complainants provide affidavits stating that the purchase amounts they claim reflect data contained in their payment records, but they do not provide copies of those records. Defendant disputes the accuracy of the amounts and argues that the affidavits provide inadequate support. Defendant also provides detailed billing information broken down by Access Customer Name Abbreviation (ACNA) code for complainants' subsidiaries.

Although, as complainants note, the Commission has accepted purchase amounts supported solely by affidavits from complainants who stated that their records indicated a different purchase amount from that averred by defendants, it did so in circumstances different from those present here. In several proceedings relating to the 1987-1988 monitoring period, the parties disputed in their briefs the amounts of service purchased by various complainants. Subsequent to the filing of reply briefs, the complainants supplemented the record by filing affidavits attesting to the accuracy of the purchase amounts they provided. See, e.g., American Network Exchange, Inc. v. Pacific Bell, File No. E-91-144. Generally, these affidavits were not contested. See id.; compare American Network Exchange, Inc. v. Indiana Bell Telephone Co., File No. E-91-136; Section 208 Complaints, 8 FCC Rcd at 1900.

In this proceeding, however, complainants filed affidavits along with their initial briefs and defendant has contested both the purchase amounts claimed and the reliability of the affidavits. Complainants have not responded to defendant's objections and have submitted no additional evidence in the form of billing records or other information to support their contentions or to rebut defendant's allegations. Therefore, we find that complainants have not met their burden of proof regarding their purchase amounts and we do not credit the disputed purchase amounts they proffer. Complainants have the burden of proof to make their case and a duty to keep all information and supporting documentation complete and current. Reconsideration Order, 8 FCC Rcd at 5494; see also 47 C.F.R. § 1.720(g). We note that complainants supplemented the record with information aimed at clarifying other disputes regarding damages in parallel proceedings (see File Nos. E-93-104-112), but made no attempt in this proceeding to supplement their claims regarding purchase amounts.

In the absence of such information, we calculate damages based on the purchase amounts admitted by defendant.

3. Defendant provided no damages calculation and does not object to the calculation provided by complainant WilTel. Therefore, we accept complainant WilTel's damages calculation.

4. Neither complainant Wiltel nor defendant has provided a calculation of offsets, nor does defendant claim offsets. Therefore, we find no offsets for this defendant against Wiltel.

NEW YORK TELEPHONE COMPANY

[amounts in dollars]

Complainant	DAMAGES[3]	OFFSETS[2]	DAMAGES AWARD
LDDS E-93-119	144,266[1,4]	188,274	-0-
Cable & Wireless E-93-119	408,870[1,4]	394,677	14,193
MCI E-93-125	6,266,142[5]	6,772,684	-0-

NOTES FOR NEW YORK TELEPHONE COMPANY

1. The parties dispute the amount of complainant LDDS's and complainant Cable & Wireless' purchases in the switched traffic sensitive access categories. Complainants provide affidavits stating that the purchase amounts they claim reflect data contained in their payment records, but they do not provide copies of those records. Defendant disputes the accuracy of the amounts and argues that the affidavits provide inadequate support. Defendant also states that complainants refused to provide purchase information in response to defendant's interrogatories.

Although, as complainants note, the Commission has accepted purchase amounts supported solely by affidavits from complainants who stated that their records indicated a different purchase amount from those averred by defendants, it did so in circumstances different from those present here. In several proceedings relating to the 1987-1988 monitoring period, the parties disputed in their briefs the amounts of service purchased by various complainants. Subsequent to the filing of reply briefs, the complainants supplemented the record by filing affidavits attesting to the accuracy of the purchase amounts they provided. See, e.g., American Network Exchange, Inc. v. Pacific Bell, File No. E-91-144. Generally, these affidavits were not contested. See id.; compare American Network Exchange, Inc. v. Indiana Bell Telephone Company, File No. E-91-136; Section 208 Complaints, 8 FCC Rcd at 1900.

In this proceeding, however, complainants filed affidavits along with their initial briefs and defendant has contested both the purchase amounts and the reliability of the affidavits. Complainants have not responded to defendant's objections and have submitted no additional evidence in the form of billing records or other information to support their contentions or to rebut defendant's allegations. Therefore, we find that complainants have not met their burden of proof regarding their purchase amounts and we will not credit the disputed purchase amounts they proffer. Complainants have the burden of proving their case and a duty to keep all information and supporting documentation complete and current. Reconsideration Order, 8 FCC Rcd at 5494; see also 47 C.F.R. § 1.720(g). We note that complainants supplemented the record with information aimed at clarifying other disputes regarding damages in parallel proceedings (see File Nos. E-93-104-112), but made no attempt in this proceeding to supplement their claims regarding purchase amounts. In the absence of such information, we calculate damages based on the purchase amounts admitted by defendant.

2. Complainants LDDS, Cable & Wireless, and MCI provided no offset calculations. Defendant provides offset calculations based on rates of return different from those reported in its final Form 492. Defendant attributes the figures it uses to its final Form 492, but provides no explanation of the discrepancy. We have recalculated offsets for the common line and special access categories based on the rates of return reported in defendant's final Form 492.

3. In its briefs in File Nos. E-93-119 and 125, defendant lists its rate of return for the switched traffic sensitive category as 13.35 percent and lists its rate of return for total interstate as 11.36 percent. While defendant's Form 492 lists the switched traffic sensitive rate of return as 13.35 percent, a related note appended to the Form 492

states that the switched traffic sensitive rate of return is 13.55 percent. The Form 492 also lists the total interstate rate of return as 11.59 percent. In File No. E-93-119 defendant admitted that its rate of return in the switched traffic sensitive category is 13.55 percent. In File No. E-93-125 defendant admitted that its rate of return in the switched traffic sensitive category is 13.35 percent. Complainants LDDS and Cable & Wireless claim that defendant's rate of return for the switched traffic sensitive category is 13.55 percent based on defendant's Form 492. Complainant MCI contended in its complaint that defendant's rate of return in the switched traffic sensitive category was 13.35 percent, but based its damages calculations contained in its briefs on 13.55 percent. In response to this change by complainant MCI, defendant clarifies that its rate of return per its Form 492 is 13.35 percent and explains that the 13.55 percent figure contained in a note appended to its Form 492 is a "normalized" rate of return. Defendant does not define "normalized" and does not explain what it means by a "normalized" rate of return. Defendant offers no explanation of the discrepancy regarding its total interstate rate of return.

The Commission has previously held that the September Form 492 is a "conclusively binding determination of a carrier's earnings." MCI Liability Order, 5 FCC Rcd at 225; cf. Amendment of Part 65, Interstate Rate of Return Prescription, 1 FCC Rcd 952, 954 (1986) (Reporting Requirements Order), aff'd on recon., 2 FCC Rcd 5340 (1987) (Reporting Requirements Recon.). Accordingly, we calculate damages based on the rates of return shown on defendant's final Form 492. We note that the 13.55 percent figure appears in a note appended to defendant's Form 492 and we credit defendant's statement that the 13.35 percent figure is correctly reported on its Form 492 while the 13.55 percent figure includes undefined adjustments to the reported rate of return.

4. We accept defendant's damages calculations. Defendant uses appropriate purchase amounts (see n.1, above) and figures from its Form 492 (see n.3, above) to calculate damages, whereas complainants LDDS and Cable & Wireless use purchase amounts and rates of return that we have rejected.

5. Defendant calculates damages based on a purchase amount different from that complainant MCI uses. Complainant MCI calculates the purchase amount it uses by multiplying defendant's total switched traffic sensitive revenue by the percentage of these total revenues its purchases represent. This percentage was provided by defendant in response to an interrogatory and is reiterated in defendant's brief. NYT Response to Interrogatories at 2; NYT Br. at Attachment C, page 1. We note that the purchase amount defendant proffers is inconsistent with the "market share" figure it twice attributes to complainant MCI. Defendant provides no verification of the purchase amount it proffers while the "market share" percentage figure it provides is supported by affidavit. Therefore, we accept the purchase amount proffered by complainant MCI.

SOUTHWESTERN BELL TELEPHONE COMPANY

[amounts in dollars]

Complainant	DAMAGES[1]	OFFSETS[2]	DAMAGES AWARD
MCI E-93-138	74,984	-0-	74,984

NOTES FOR SOUTHWESTERN BELL TELEPHONE COMPANY

1. In its damages calculation, defendant without explanation uses a rate of return different from that reported in its Form 492 for the special access category. Similarly, in its damages calculation, complainant MCI used an erroneous tax factor. Therefore, we have recalculated damages using the rate of return reflected in defendant's Form 492 and the correct tax factor.

2. Defendant provides figures for underearnings, percent of earnings attributable to MCI, and offsets for the common line and switched traffic sensitive categories, but it does not explain how these figures were calculated. We find that defendant has presented insufficient information for us to evaluate its claims regarding the amount of the offsets. Cf. Allnet Communications Services, Inc. v. New York Telephone Company, 8 FCC Rcd 3087, 3092-94 (1993) (Earnings and billings data found inadequate to support damages claim absent calculation). Complainant MCI provides no offset calculations. Therefore, we are unable to determine the amount of offsets in this proceeding and none will be allowed.

SPRINT CORP. TELEPHONE OPERATING COS.

[amounts in dollars]

United of Florida

Complainant	DAMAGES[1]	OFFSETS[1]	DAMAGES AWARD
LDDS E-93-113	188,857	(132,909)	55,948

United - Midwest Group

Complainant	DAMAGES[1,3]	OFFSETS[1,3]	DAMAGES AWARD
LDDS E-93-114	12,827	(4,670)[4]	8,157

Centel - Virginia

Complainant	DAMAGES[1,2]	OFFSETS[1]	DAMAGES AWARD
LDDS E-93-116	12,326	(2,283)	10,043

Centel - Texas

Complainant	DAMAGES[1,3]	OFFSETS[1,3]	DAMAGES AWARD
LDDS E-93-115	23,121	(6,784)	16,337

NOTES FOR SPRINT CORP. TELEPHONE OPERATING COS.

1. Defendants' damages and offsets calculations do not show how the amounts of over- and under- earnings were calculated. Therefore, we do not have enough information to evaluate defendants' calculations that reflect over- and under- earnings amounts different from those calculated by complainant. Complainant's calculations clearly show how they derived over- and under- earnings amounts. Except where noted, complainant uses the same purchase amounts as defendant. Therefore, we accept complainant's calculations of damages and offsets, except as noted.

2. Complainant proffers a purchase amount for the special access category different from that proffered by defendant, and supplies an affidavit stating that the purchase amount it proffers reflects data contained in its payment records. Defendant does not challenge complainant's submission. Therefore, we accept the purchase amount for the special access category proffered by complainant.

3. Complainant erroneously uses the overall target rate of return plus buffer of 12.25 percent to calculate damages and offsets on a per category basis. We note that the target rate of return plus buffer for category overearnings is 12.40 percent. The overall target rate of return plus buffer of 12.25 percent is inapplicable to overearnings calculated on a per category basis. Further, we note that the target rate of return of 12.00 percent is used to calculate offsets correctly because a defendant cannot be said to have underearned to the extent its earnings exceed the target rate of return. See, e.g., Allnet v. U S West, 8 FCC Rcd at 3023 n.63. Complainant's damages and the corresponding offsets have been recalculated using the correct rates.

4. Both complainant LDDS and defendant calculate an offset for underearnings in the common line category. Defendant earned, however, 12.07 percent in this category, which is within the authorized range of 12.00 percent to 12.40 percent for category earnings. Therefore, there are no damages or offsets for this category. See MidAmerican Long Distance Co. v. Pacific Bell, 8 FCC Rcd 1201, 1210 n.93 (1993).

US WEST COMMUNICATIONS

[amounts in dollars]

Complainant[1]	DAMAGES	OFFSETS[4]	DAMAGES AWARD
LDDS E-93-123	926,779[2,3]	-0-	926,779
One to One E-93-123	170,372[2,3]	-0-	170,372
Pacnet E-93-123	15,677[3]	-0-	15,677
Teleconcepts E-93-123	107,593[3]	-0-	107,593
Call-America E-93-151	16,288[5]	-0-	16,288

NOTES FOR US WEST COMMUNICATIONS

1. Cable & Wireless, which was originally a complainant in File No. E-93-123, was dismissed as a complainant pursuant to a joint motion of the parties. Cable & Wireless, Inc. v. U S West Communications, Inc., DA 94-1064 (released Oct. 4, 1994).

2. The parties dispute the amount of complainant LDDS's purchases in the switched traffic sensitive and special access categories and complainant One to One's purchases in the switched traffic sensitive category. Complainants provide affidavits stating that the purchase amounts they provide reflect data contained in their payment records, but they do not provide copies of those records. Defendant states that it discovered errors in its purchase amounts and provides new purchase amounts and damages calculations that it characterizes as representing its "best effort." Defendant also states that it does not object to an additional filing by complainants regarding damages. U S West RBr. at 3-4. Defendant does not support its purchase amounts with affidavits or copies of billing records. Therefore, we accept the purchase amounts proffered by complainants LDDS and One to One.

3. Complainants LDDS, One to One, Pacnet, and Teleconcepts erroneously use the overall target rate of return plus buffer of 12.25 percent to calculate damages on a per category basis. We note that the target plus buffer rate for category overearnings is 12.40 percent. Complainants' damages have been recalculated using 12.40 percent.

4. All complainants and defendant in File Nos. E-93-123 and 151 calculate an offset for underearnings in the common line category. Defendant, however, earned 12.04 percent in this category, which is within the authorized range of 12.00 percent to 12.40 percent for category earnings. Therefore, there are no damages or offsets for this category and, consequently, there are no offsets in either proceeding. See MidAmerican Long Distance Co. v. Pacific Bell, 8 FCC Rcd 1201, 1210, n.93 (1993).

5. Both complainant Call America and defendant erroneously use the overall target rate of return plus buffer of 12.25 percent to calculate damages on a per category basis. We note that the target rate of return plus rate for category overearnings is 12.40 percent. The overall target rate of return plus buffer of 12.25 percent is inapplicable to overearnings calculated on a per category basis. Complainant Call America's damages have been recalculated using 12.40 percent.

APPENDIX D

Effective Period	Rate	Internal Revenue Service Citation
01/01/91 - 03/31/91	10%	Rev.Rul. 90-94, 1990-46 I.R.B. 16
04/01/91 - 06/30/91	9%	Rev.Rul. 91-20, 1991-11 I.R.B. 1
07/01/91 - 09/30/91	9%	Rev.Rul. 91-33, 1991-21 I.R.B. 1
10/01/91 - 12/31/91	9%	Rev.Rul. 91-50, 1991-37 I.R.B. 1
01/01/92 - 03/31/92	8%	Rev.Rul. 91-65, 1991-51 I.R.B. 1
04/01/92 - 06/30/92	7%	Rev.Rul. 92-21, 1992-14 I.R.B. 14
07/01/92 - 09/30/92	7%	Rev.Rul. 92-44, 1992-24 I.R.B. 86
10/01/92 - 12/31/92	6%	Rev.Rul. 92-77, 1992-38 I.R.B. 12
01/01/93 - 03/31/93	6%	Rev.Rul. 92-110, 1992-52 I.R.B. 15
04/01/93 - 06/30/93	6%	Rev.Rul. 93-24, 1993-14 I.R.B. 5
07/01/93 - 09/30/93	6%	Rev.Rul. 93-40, 1993-23 I.R.B. 9
10/01/93 - 12/31/93	6%	Rev.Rul. 93-63, 1993-30 I.R.B. 40
01/01/94 - 03/31/94	6%	Rev.Rul. 93-94, 1993-42 I.R.B. 42
04/01/94 - 06/30/94	6%	Rev.Rul. 94-21, 1994-14 I.R.B. 14
07/01/94 - 09/30/94	7%	Rev.Rul. 94-39, 1994-26 I.R.B. 9
10/01/94 - 12/31/94	8%	Rev.Rul. 94-58, 1994-39 I.R.B. 6

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FCC 95-14

In the Matter of	)	
	)	
Assessment and Collection	)	MD Docket No. 95-3
of Regulatory Fees for	)	
Fiscal Year 1995	)	

NOTICE OF PROPOSED RULEMAKING

Adopted: January 10, 1995 ; Released: January 12, 1995

Comment Date: February 13, 1995
Reply Date: February 28, 1995

By the Commission:

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I. Introduction

1. By this Notice of Proposed Rulemaking, the Commission begins a proceeding to revise its Schedule of Regulatory Fees in order to recover the amount of regulatory fees that Congress, pursuant to section 9 of the Communications Act, has required it to collect for Fiscal Year 1995 (FY 1995). See 47 U.S.C. § 159 (b)(2). The current Schedule is set forth in sections 1.1152 through 1.1155 of the Commission's rules. 47 C.F.R. §§ 1.1152-1.1155.

2. We are proposing adjustments to the Schedule in order to recover $116,400,000 in costs, consistent with the amount that Congress has appropriated for our enforcement, policy and rulemaking and international activities and user information services for FY 1995.[1] 47 U.S.C. § 159(a). In addition, we propose to amend the Schedule to assess regulatory fees from licensees of services not now included in the Schedule and to revise our method of assessing fees for certain services currently in the Schedule. 47 U.S.C. §§ 159(b)(1)(A), (b)(3). Further, we propose to amend the format of the Schedule so that its fee categories reflect changes in the Commission's new organizational structure.[2] 47 U.S.C. § 159(b)(3). Finally, we propose to adjust the threshold amounts for eligibility for installment payments and to amend our procedures governing installment payments. 47 U.S.C. § 159(f)(1).

3. In many instances, the regulatory fees that we are proposing for FY 1995 are significantly higher than the fees that we assessed under the statutory fee schedule to recover our regulatory costs for FY 1994. See 47 U.S.C. 159(g); see also Implementation of Section 9 of the Communications Act (FY 1994 Order), 9 FCC Rcd 5333 (1994). These revisions result, in large part, from increases in the amounts that Congress has

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[1] See Public Law 103-317, 108 Stat. 1724 at 1737-38 (Approved August 26, 1994).

[2] Specifically, we propose to add to the Schedule a Wireless Radio Services fee category and an International Services fee category. Concurrently, we propose to delete the Private Radio Service fee category since we have abolished the Private Radio Bureau. Also, we propose to amend the Common Carrier Service fee category and the Mass Media Service fee category because certain services formerly subject to regulation by the Common Carrier Bureau and the Mass Media Bureau are now regulated by the Wireless Radio Bureau and the International Bureau and are, thus, properly within the scope of the Wireless Radio and International Service fee categories. Finally, we propose to add the Multipoint Distribution Service (MDS) and Multichannel Multipoint Distribution Service (MMDS) to the Mass Media Service fee category, and delete them from the Common Carrier Service fee category, since these services are now regulated by the Mass Media Bureau.

appropriated for Commission activities whose costs must be recovered through regulatory fees. As noted, the amount appropriated and to be recovered through regulatory fees is $116,400,000, which is 93 percent more than the $60,400,000 that the Commission was required to recover through regulatory fees in FY 1994. The impact of this increase is, however, offset to some extent by revenues from services that we propose to add to the Schedule and by increases in the number of payment units, e.g., subscribers, in certain other services.[3] Appendix B sets forth our proposed Schedule of Regulatory Fees for FY 1995.

II. Background

4. Section 9(a) of the Act authorizes the Commission to assess and collect annual regulatory fees to recover the costs, as determined annually by Congress, that it incurs in carrying out enforcement, policy and rulemaking, international activities, and user information services. 47 U.S.C. 159(a). In our FY 1994 Order, we set forth the regulatory fee schedule for FY 1994 and prescribed rules to govern payment of the fees, as required by Congress.[4] 47 U.S.C. § 159(f)(1).

5. For FY 1994, we adopted the Schedule of Regulatory Fees that Congress enacted in section 9(g) of the Act, and required regulatory fee payments from licensees and other regulatees operating in the Private Radio, Mass Media, Common Carrier and Cable Television services. We concluded that Congress did not intend for us to modify section 9(g)'s Schedule of Regulatory Fees for FY 1994, and, thus, declined to amend the statutory fee schedule in any way.[5] See FY 1994 Order at para. 12.

6. For fiscal years after FY 1994, however, sections 9(b)(2) and (3) provide for annual "Mandatory Adjustments" and "Permitted

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[3] Payment units represent the number by which a payor must multiply the fee amount for a particular service in order to calculate its total fee due for the service. For example, "subscribers" is the payment unit applicable to cable television fees. The number of subscribers is multiplied by the cable system fee amount to determine the system's total fee liability.

[4] See 47 C.F.R. §§ 1.1151 through 1.1166.

[5] In the FY 1994 Order, we adopted rules to implement the collection of regulatory fees, including payment procedures, specific exemptions from the payment of regulatory fees, procedures for requesting waivers, reductions and deferments of fee payments, and penalties for late payment or non-payment of the fees. We shall in the near future address petitions for reconsideration of the FY 1994 Order and consider whether to make amendments to our implementing rules.

Amendments" to the Schedule of Regulatory Fees. In making section 9(b)(2)'s mandatory adjustments, we are first to consider the amount we are to collect as set forth in our Appropriations Act. 47 U.S.C. §§ 159(b)(2),(b)(1)(B). Second, we are to identify the number of Full Time Equivalent (FTE) employees allocated to our enforcement, policy and rulemaking, user information and international activities.[6] 47 U.S.C. § 159 (b)(1)(A). 159(b)(1)(A). Third, we are to determine the amount to be recovered from each fee category, e.g., Common Carrier, by proportionately increasing or decreasing the revenue requirement of each fee category relative to the ratio of FTEs in each category to the total number of FTEs allocated to our regulatory activities. 47 U.S.C. § 159(b)(2). The resulting fee category share of the total amount to be recovered is then prorated among each service within the fee category to determine the cost allocation applicable to each service. Finally, the prorated cost allocation is divided by the number of estimated payment units, e.g., subscribers, for each service within the category in order to determine service fees. 47 U.S.C § (b)(2)(A).

7. In addition, section 9(b)(3), relating to "Permitted Amendments" to the Schedule, provides that, if we find it necessary, we shall amend the Schedule of Regulatory Fees, as provided in section 9(b)(1)(A) to, inter alia, reflect the benefits of our regulation to the payors of the fees by considering their service areas, the nature of their service, and other factors that we determine are necessary in the public interest. 47 U.S.C. §§ 159(b)(3),(b)(1)(A). In making these amendments, we "shall add, delete, or reclassify services in the Schedule to reflect additions, deletions or changes in the nature of its services." 47 U.S.C. § 159(b)(3). Finally, we are required to notify Congress of any permitted amendments 90 days before those amendments go into effect. 47 U.S.C. § 159(b)(4)(B).

III. Discussion

A. Proposed FY 1995 Regulatory Fees

8. As noted above, Congress has required the recovery of $116,400,000 for FY 1995 through the collection of regulatory fees representing the costs applicable to our enforcement, policy and rulemaking, international activities, and our user information services. 47 § U.S.C. 159(a).

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[6] Full Time Equivalent (FTE) employment is the total number of regular straight-time hours (i.e., not including overtime or holiday hours) worked by employees divided by the number of compensable hours applicable to each fiscal year. See Office of Management and Budget Circular A-11, section 13.1, Definitions relating to employment.

9. In adjusting our regulatory fees pursuant to section 9(b)(2)'s provisions for "Mandatory Adjustments", we first distributed our directly assigned FY 1995 FTE's among our various regulatory activities. We then allocated additional FTEs supporting the regulatory fee activities to the Private Radio, Mass Media, Common Carrier, and Cable Services Bureaus.[7] Appendix C contains a more detailed description of our allocation of FTEs by activity. The resulting allocation of FTEs is as follows:

	FTEs	Percentage Ratio
Private Radio	103	7.3
Mass Media	253	18.0
Common Carrier	689	49.0
Cable Services	361	25.7
Total	1,406	100.0

10. Next, we allocated our $116,400,000 revenue requirement to the Private Radio, Mass Media, Common Carrier, and Cable Services activities, based on the FTE percentage ratios shown above. For example, to derive the amount to be recovered from cable services, we calculated that the 25.7 percent of total FTEs representing the 361 FTEs assigned to the cable services activity resulted in $29,824,911 to be recovered through the collection of cable services fees.[8] The resulting allocation of costs by regulatory fee category was as follows:

Private Radio	$ 8.5 million
Mass Media	20.9 million
Common Carrier	57.0 million
Cable Services	29.9 million

11. After determining the cost allocation, we estimated FY 1995 payee units for the individual services within each fee category.

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[7] The FTEs attributed to Private Radio, Mass Media, Common Carrier, and Cable services activities are primarily performed within those Bureaus. In addition, the Compliance and Information Bureau (CIB), formerly the Field Operations Bureau, the Office of Engineering and Technology (OET) and the Office of Managing Director (OMD) perform activities supporting the Bureaus. FTEs assigned to CIB, OET and some sections of OMD supporting the regulatory activities of the Bureaus were attributed to the Bureaus' activities in developing the total FTEs allocated to the activities whose costs are to be recovered through regulatory fees.

[8] We have rounded all percentages to the nearest one-tenth of a percent.

For example, we estimated that there are approximately 57,000,000 payment units for cable systems, i.e., cable subscribers. These estimates are based upon information provided by Commission program managers and supplemented by information contained in actual licensee data bases maintained by the Commission, information provided by industry groups or contained in trade publications, and actual data from FY 1994 regulatory fee collections. See Appendices D through G.

12. Next, in order to make the proportionate changes in the statutory schedule of fees required by section 9(b)(2), we compared our FY 1995 revenue requirement in each fee category, e.g., Cable Services, with the total amount that would be collected from all of the services within each category under the FY 1994 fee schedule. For example, we estimated that approximately $21.5 million or $8.4 million less than its FY 1995 revenue requirement, would be collected from cable system payors based upon our FY 1994 fees. We pro-rated the difference in these amounts to the individual services, e.g., cable systems were allocated $29.9 million to be recovered, and then divided the revenue requirement for each individual service by its estimated number of payee units to derive our "Mandatory Adjustments" to the fee schedule.

13. Following our calculation of the "Mandatory Adjustments" to the fee schedule, we reviewed each service and its associated fee payment to determine if the nature of a service or the public interest warranted a fee adjustment pursuant to section 9(b)(3)'s requirements for "Permitted Amendments." Pursuant to our authority to make permitted amendments to the fees, we are proposing to revise our method for calculating fees for AM and FM radio stations, public mobile service, including cellular service providers, competitive access providers (CAPs), and small earth station antennas. Additionally, we are proposing a separate fee for satellite television stations to distinguish those stations from full service television stations and we are proposing to add a fee requirement for licensees of FM translator and booster stations. After making these proposed permitted amendments, we propose to revise the remaining fees within the affected service's category in order to take into account the impact of the fee modification upon other services within the category. Finally, we propose to combine certain services within a fee category having analogous fee amounts, such as public mobile and cellular licenses, in order to reduce the number of separate service categories and to simplify the overall schedule of fees.[9]

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[9] We have not proposed regulatory fees for the Personal Communications Service (PCS), Commercial Mobile Radio Service (CMRS), Low Earth Orbital (LEO) Satellite Service and the Direct Broadcasting Satellite (DBS) Service because no facilities were authorized on our proposed date for calculating fees, October 1,

14. In the following paragraphs, we describe our mandatory adjustments and proposed permitted amendments to the Schedule of Regulatory Fees on a service-by-service basis. The Commission proposes to retain, for fee determination purposes, the fee classifications (i.e., Private Radio, Common Carrier, Cable Services and Mass Media) contained in 47 U.S.C. Section 159. Although we believe that we have authority to change the classifications to align them more closely with our current organizational structure, we want to minimize any adverse impacts to the schedule brought about solely by such a classification change. Although we have developed the fee amounts for FY 1995 based upon the service categories in the statutory fee schedule, in order to assist interested parties in locating particular fees, we have formatted the FY 1995 Schedule of Fees to reflect our new organizational structure. See Appendix B. With the exception of annual fees in the amount of $5.00 or less, individual fee amounts have been rounded to the nearest $5 in the case of fees under $1,000 or to the nearest $25 in the case of fees of $1,000 or more in accordance with section 9(b)(2). Appendices C through G describe the method in which FTEs were assigned to the major service categories and the development of the fees within each major service category.

1. Private Radio Services

15. Regulatory fees for services in the Private Radio category are located in the Wireless Radio category of the proposed fee schedule. We have developed our FY 1995 regulatory fees for Private Radio services by making mandatory adjustments to their statutory fees that take into account the quality of frequency allocated to those services. See Appendix D. As a result, we are proposing to continue to assess two levels of regulatory fees for these services, exclusive use services and shared use services, on the basis of the quality of the communications channel provided to the licensee. Our action here is consistent with section 9's directive that fees take into account the benefits provided to the payee of the fees and with the policy reflected in the statutory schedule, which provides for higher fee payments for exclusive use services within the Private Radio category of services. See 47 U.S.C. 159(b)(1)(A), (g). Further, it is consistent with the statutory fee schedule's formulation of fees for exclusive and shared services.

16. We are proposing no change to the rules for calculating fee payments and submitting regulatory fee payments for private radio

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1994, to operate in these services or such authorizations are so recent that negligible portion of FTEs are assigned to these services other than for application processing.

services. See FY 1994 Order, Appendix B at paras. 2-12. Rather, due to the relatively small regulatory fees generally assessed for these services, we propose to continue to require applicants for new, reinstatement and renewal licenses in these services to submit the entire regulatory fee for the full term of their requested license at the time they file their license applications.[10] See 47 U.S.C. 159(f)(1). Applicants for modification or assignment of an existing authorization will not be required to submit a regulatory fee. However, the expiration date of these authorizations will reflect only the unexpired term of the underlying license rather than a new license term.

a. Exclusive Use

17. Land Mobile Services, set forth in the FY 1995 regulatory fee schedule within the wireless radio service category, include those authorized under Part 90 of the Commission's Rules to provide limited access wireless radio service that allows high quality voice or digital communications between vehicles or to fixed stations to further the business activities of the licensee. These Services, using the 220-222 MHz band and frequencies at 470 MHz and above, may be offered on a private carrier basis in the Specialized Mobile Radio Services (SMRS). Our FY 1995 cost allocation to the Land Mobile Services fee category is $462,455, resulting from the mandatory adjustment of its FY 1994 revenue requirement under the statutory fee schedule. Payment units for Land Mobile Services are estimated to be 13,213 licenses. Dividing the cost allocation to the Land Mobile Service fee category by its payment units and its license term of five years results in an annual fee of $7 per license.[11] See Appendix D. Thus, we are proposing that Land Mobile licensees be subject to a $7 annual regulatory fee per license, payable for an entire five or ten year license term at the time of application for a new, renewal or reinstatement license. The total regulatory fee due would be either $35 for a license with a five year term or $70 for a license with a 10 year term. We are proposing no change to the rules for calculating and submitting regulatory fees by Land Mobile licensees. See FY 1994 Order, Appendix B at para. 4.

18. Microwave Services, set forth in the FY 1995 fee schedule

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[10] In the event that the subject application is not granted, the entire regulatory fee submitted will be returned upon request of the payor of the fee. See 47 C.F.R. § 1.1159(a)(2)(iii).

[11] Although this fee category includes licenses with ten year terms, the estimated volume of ten year license applications in FY 1995 is less than one tenth of one percent and, therefore, is statistically insignificant.

within the wireless radio service category, include private microwave systems and private carrier systems authorized under Part 94 of the Commission's Rules to provide telecommunications services between fixed points on a high quality channel of communications. Microwave systems are often used to relay data and to control railroad, pipeline and utility equipment. Our FY 1995 cost allocation to Microwave Services is $225,400, resulting from the mandatory adjustment to its FY 1994 revenue requirement under the statutory fee schedule. Payment units for Microwave Services are estimated to be 6,440 licenses. Dividing the revenue requirement of Microwave Services by its payment units and license term of five years results in an annual fee of $7 per license. See Appendix D. Thus, we are proposing that microwave licensees be subject to a $7 annual regulatory fee per license, payable for an entire five year license term at the time of application for a new, reinstatement or renewal license. The total regulatory fee due would be $35 for the five year license term. We are proposing no change to the rules for calculating and submitting regulatory fee payments by Microwave Services. See FY 1994 Order, Appendix B at para. 5.

19. Interactive Video Data Service (IVDS), set forth in the FY 1995 fee schedule within the wireless radio service category, is a two-way point-to-multi-point radio service allocated high quality channels of communications and authorized under Part 95 of the Commission's Rules. IVDS provides information, products and services, and also the capability to obtain responses from subscribers in a specific service area. IVDS is offered on a private carrier basis. Our FY 1995 revenue requirement attributable to IVDS is $50,750, resulting from the mandatory adjustment to its FY 1994 revenue requirement under the statutory fee schedule. Payment units for IVDS are estimated at 1,450 licenses. Dividing the revenue requirement of IVDS by its payment units and license term of five years results in an annual fee of $7 per license. See Appendix D. We are proposing that IVDS licensees be subject to a $7 annual regulatory fee per license, payable for an entire five year license term at the time of application for a new, reinstatement or renewal license. The total regulatory fee due would be $35 for the five year term of the license. We are proposing no change to the rules for calculating and submitting regulatory fee payments for IVDS. See FY 1994 Order, Appendix B at para. 6.

b. Shared Use Services

20. Licensees in the following services, set forth in the FY 1995 fee schedule within the wireless radio service category, generally operate on shared frequencies.

21. Marine (Ship) Service is a shipboard radio service authorized under Part 80 of the Commission's Rules to provide

telecommunications between watercraft or between watercraft and shore-based stations. Radio installations are required by domestic and international law for large passenger or cargo vessels. Radio equipment may be voluntarily installed on smaller vessels, such as recreational boats. Our FY 1995 cost allocation to the Marine (Ship) Service fee category is $5,070,420, resulting from the mandatory adjustment to its FY 1994 revenue requirement under the statutory fee schedule. Payment units for Marine (Ship) Service are estimated to be 169,014 stations. Dividing the revenue requirement of the Marine (Ship) Service by its payment units and license term of ten years results in an annual fee of $3 per station. See Appendix D. Thus, we are proposing that marine (ship) station licensees be subject to a $3 annual regulatory fee per station, payable for an entire ten year license term at the time of application for a new, reinstatement or renewal license. The total regulatory fee due would be $30 for the ten year license term. We are proposing no change to the rules for calculating and submitting regulatory fee payments by the Marine (Ship) Service licensees. See FY 1994 Order, Appendix B at para. 9.

22. Marine (Coast) Service, set forth in the FY 1995 fee schedule within the wireless radio service category, includes land-based stations in the maritime services, authorized under Part 80 of our rules, to provide communications services to ships and other watercraft in coastal and inland waterways. Our FY 1995 cost allocation to the Marine (Coast) Services is $41,955, resulting from the mandatory adjustment of its FY 1994 revenue requirement under the statutory fee schedule. Payment units for the Marine (Coast) Service are estimated to be 2,797 licenses. Dividing the revenue requirement of the marine (Coast) Service by its payment units and license term of five years results in an annual fee of $3 per license. See Appendix D. Thus, we are proposing that these licensees be subject to a $3 annual regulatory fee per call sign, payable for the entire five year license term at the time of application for a new, reinstatement or renewal license. The total regulatory fee due would be $15 per call sign for the five year license term. We are proposing no change to the rules for calculating and submitting regulatory fee payments by the Marine (Coast) Service. See FY 1994 Order, Appendix B at para. 9.

23. Private Land Mobile (Other) Services, set forth in the FY 1995 fee schedule within the wireless radio service category, includes land mobile radio services operating under Parts 90 and 95 of the Commissions Rules. Services in this category provide one or two way communications between vehicles, persons or to fixed stations on a shared basis and include radiolocation services, private carrier paging services, industrial radio services and land transportation radio services. Our FY 1995 cost allocation for Private Land Mobile (Other) Services is $1,396,275, resulting from the mandatory adjustment to its FY

1994 revenue requirement under the statutory fee schedule. Payment units for Private Land Mobile (Other) Services are estimated to be 93,085 licenses. Dividing the revenue requirement of the Services by their payment units and license term of five years results in an annual fee of $3 per license. See Appendix D. Therefore, we are proposing that licensees of services in this category be subject to a $3 annual regulatory fee per call sign, payable for an entire five year license term at the time of application for a new, reinstatement or renewal license. The total regulatory fee due would be $15 for the five year license term. We are proposing no change to the rules for calculating and submitting regulatory fee payments by Private Land Mobile Service licensees. See FY 1994 Order, Appendix B at para. 11.

24. Aviation (Aircraft) Service, set forth in the FY 1995 fee schedule within the wireless radio service category, includes stations authorized to provide communications between aircraft and from aircraft to ground stations and includes frequencies used to communicate with air traffic control facilities pursuant to part 87 of our rules. Our FY 1995 revenue requirement attributable to the Aviation (Aircraft) Service is $1,130,430, resulting from the mandatory adjustment to its FY 1994 revenue requirement under the statutory fee schedule. Payment units for the Aviation (Aircraft) Service are estimated to be 37,681 stations. Dividing the revenue requirement of the Aviation (Aircraft) Service by its payment units and license term of ten years results in an annual fee of $3 per station. See Appendix D. Thus, we are proposing that licensees of aircraft stations be subject to a $3 annual regulatory fee per station, payable for the entire ten year license term at the time of application for a new, reinstatement or renewal license. The total regulatory fee due would be $30 per station for the ten year license term. We are proposing no change to the rules for calculating and submitting regulatory fee payments by Aviation (Aircraft) Service licensees. See FY 1994 Order, Appendix B at para. 8.

25. Aviation (Ground) Service, set forth in the FY 1995 fee schedule within the wireless radio service category, includes stations authorized to provide ground-based communications to aircraft for weather or landing information, or for logistical support pursuant to Part 87 of the rules. Our FY 1995 revenue requirement attributable to the Aviation (Ground) Service is $39,900, resulting from the mandatory fee adjustment to its revenue requirement under the statutory fee schedule. Payment units for the Aviation (Ground) Service are estimated to be 2,660 licenses. Dividing the Service's revenue requirement by its payment units and licenses term five years results in an annual fee of $3 per license. See Appendix D. Thus, we are proposing that these licensees of aviation ground stations be subject to a $3 annual regulatory fee per license, payable for the entire five year license term at the time of application for a new,

reinstatement or renewal license. The total regulatory fee would be $15 per call sign for the five year license term. We are proposing no change to the rules for calculating and submitting regulatory fee payments by Aviation (Ground) Service licensees. See FY 1994 Order, Appendix B at para. 8.

26. General Mobile Radio Service (GMRS), set forth in the FY 1995 fee schedule within the wireless radio service category, includes land mobile radio licensees providing personal and limited business communications between vehicles or to fixed stations for short-range, two-way communications pursuant to Part 95 of our rules. Our FY 1995 cost allocation for GMRS is $41,775, resulting from the mandatory adjustment to its FY 1994 revenue requirement. Payment units for GMRS are estimated to be 2,785 licenses. Dividing GMRS' revenue requirement by its payment units and license term of five years results in an annual fee of $3 per license. See Appendix D. Thus, we are proposing that (GMRS) licensees be subject to a $3 annual regulatory fee per license, payable for an entire five year license term at the time of application for a new, reinstatement or renewal license. The total regulatory fee due would be $15 per license for the five year license term. We are proposing no change to the rules for calculation and submission of regulatory fee by GMRS licensees. See FY 1994 Order, Appendix B at para. 10.

c. Amateur Radio Vanity Call-Signs

27. Amateur Vanity Call-Signs, set forth in the FY 1995 fee schedule within the wireless radio service category, covers voluntary requests for specific call-signs in the Amateur Radio Service. We have not yet concluded our rulemaking proceeding concerning authorizing vanity call-signs. See Notice of Proposed Rulemaking, 9 FCC Rcd 105 (1993). Nevertheless, we are including a fee for vanity call signs since we expect to conclude this proceeding during FY 1995. Our FY 1995 cost allocation to Amateur Vanity Call-Signs is $60,000, resulting from the mandatory adjustment to its FY 1994 revenue requirement under the statutory fee schedule. See Appendix D. Payment units for Amateur Vanity Call-Signs are estimated to be 2,000 licenses. Dividing this service category's cost allocation by its estimated payment units and license term of ten years results in a fee of $3 per year per license. Thus, we are proposing that applicants for amateur vanity call-signs be subject to a $3 annual regulatory fee per call-sign, payable for an entire ten year license term at the time of application for a vanity call sign. The total regulatory fee due would be $30 per license for the ten

year license term.[12] We are proposing no change to the rules for calculating and submitting regulatory fees for amateur vanity call-sign licensees. See FY 1994 Order, Appendix B at para. 12.

2. Mass Media

28. The regulatory fees for the Mass Media fee category apply to broadcast licensees and permittees.

a. Commercial AM and FM Radio

29. These categories include licensed commercial AM (Classes A, B, C, and D) and FM (Classes A, B, B1, C, C1, C2, and C3) radio stations operating under Part 73 of the Commission's rules. In developing our FY 1995 individual fee amounts for AM and FM stations, we determined that the public interest required that we retain the operational class distinctions among AM and FM stations that Congress established in its statutory fee schedule. Also, as a permissive amendment and consistent with petitions for rulemaking filed by Teddy Bear Communications, Inc. and La Paz Broadcasting, Inc., we included a further distinction in order to recognize that the population density of a station's geographic location was also a public interest factor warranting recognition in the fee schedule. After due consideration, we decided that stations located in Arbitron radio markets vis-a-vis those not located in these markets provided a logical distinction for allocating the fee burden.[13] We quantified this distinction by adopting a fee ratio between the Arbitron and non-Arbitron markets similar to the ratio of the fee requirement the statutory fee scheduled established for the larger television station markets and the schedule's "remaining markets."[14] Thus, for AM

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[12] Section 9(h) exempts "amateur radio operator licenses under part 97 of the Commission's regulations (47 C.F.R. Part 97)" from the requirement. However, section 9(g)'s fee schedule explicitly includes "Amateur vanity call signs" as a category subject to the payment of a regulatory fee.

[13] Arbitron has identified 261 Metro Survey Areas (MSAs) that range in population from 14,033,500 (Market 1) to 47,100 persons (Market 261). Stations operating outside Arbitron's MSAs are considered to be located in "non-arbitron markets" serving more rural geographic areas. See Arbitron rankings, Broadcasting & Cable Yearbook, compiled annually by R. R. Bowker, a Reed Reference Publishing Company. For the formulation of FY 1995 AM and FM fees, we have used the 1994 edition of the Yearbook since it provides the most recently published market data.

[14] See Appendix for a more detailed explanation of the development of our fees for AM and FM radio stations.

and FM stations we exercised our authority to make permitted amendments to the fee schedule in order to lower the fees for stations with relatively small coverage areas and daytime only operations and for stations operating in rural areas. The following are our proposed regulatory fees for AM and FM stations.

AM Radio	
Class A (Arbitron Market)	$1,525
Class A (Non-Arbitron Market)	565
Class B (Arbitron Market)	850
Class B (Non-Arbitron Market)	315
Class C (Arbitron Market)	340
Class C (Non-Arbitron Market)	125
Class D (Arbitron Market)	425
Class D (Non-Arbitron Market)	155
FM Radio	
Classes C, C1, C2, B (Arbitron Market)	$1,525
Classes C, C1, C2, B (Non-Arbitron Market)	565
Classes A, B1, C3 (Arbitron Market)	1,025
Classes A, B1, C3 (Non-Arbitron Market)	375

We are proposing no change to the rules for calculating and submitting regulatory fees by AM and FM radio station licensees. See FY 1994 Report, Appendix B at paras. 14-17 and 19.

b. Construction Permits - Commercial AM Radio

30. This category includes holders of permits to construct new AM stations. The FY 1995 cost allocation for commercial AM construction permit fee category is $9,480, resulting from the mandatory adjustment to its FY 1994 revenue requirement under the statutory fee schedule. Payment units for the category are estimated to be 79 AM construction permits. Dividing the revenue requirement for AM construction permits by estimated payment units results in a regulatory fee of $120 per construction permit. See Appendix E. Thus, for FY 1995, we are proposing to assess permittees $120 for each permit held. Upon issuance of an operating license, this fee would no longer be applicable and licensees would be required to pay the applicable fee for the designated class/market of the station. We are proposing no change in the rules for calculating and submitting the regulatory fee by AM construction permittees. See FY 1994 Order, Appendix B at para. 18.

c. Construction Permits - Commercial FM Radio.

31. This category includes holders of permits to construct new commercial FM stations. The FY 1995 cost allocation for commercial FM radio construction permits is $418,285, resulting from the mandatory adjustment to the category's FY 1994 revenue

requirement under the statutory fee schedule. Payment units are estimated to be 703 FM construction permits. Dividing the revenue requirement for FM construction permits by estimated payment units results in a regulatory fee $595 per permit. See Appendix E. Thus, for FY 1995, we are proposing to assess permittees $595 for each permit held. Upon issuance of an operating license, this fee would no longer be applicable. Instead, licensees would pay a regulatory fee based upon the designated class/market of the station. We are proposing no change in the rules for calculating and submitting regulatory fees by FM construction permittees. See FY 1994 Order, Appendix B at para. 20.

d. Commercial Television Stations.

32. This category includes licensed commercial VHF and UHF television stations covered under Part 73 of the Commissions rules, except commonly owned television satellite stations, addressed separately below. We are proposing to assess commercial television stations annual fees based on the stations' market rankings as published by Warren Publishing in the 1994 Edition of the Television and Cable Factbook (No. 62). The FY 1995 revenue requirements for the different categories of VHF and UHF commercial television stations are shown in Appendix E, including both an amount resulting from the services mandatory adjustment and an additional amount required to offset the reduced fee for satellite television stations, described below, pursuant to our authority to make permitted amendments to the fees. Payment units for each service category with the commercial television fee category are shown in Appendix E. Dividing the revenue requirements for each commercial television station category by the corresponding estimate of payment units results in the following proposed fees to be assessed on stations in each ADI market grouping:

VHF Markets 1-10.....$21,450
VHF Markets 11-25.....19,075
VHF Markets 26-50.....14,300
VHF Markets 51-100.....9,525
VHF Remaining Markets.....5,950

UHF Markets 1-10.....$17,150
UHF Markets 11-25.....15,250
UHF Markets 26-50.....11,450
UHF Markets 51-100.....7,625
UHF Remaining Markets.....4,775

See Appendix E. We are proposing no change to the rules for calculating and submitting regulatory fee payments by television stations licensees. See FY 1994 Order, Appendix B at para. 21-24.

e. Commercial Television Satellite Stations

33. Pursuant to our authority to make permissive amendments to our regulatory fees, we are also proposing that commonly owned television satellite stations in any market (authorized pursuant to Note 5 of Section 73.3555 of the Commission's Rules) that retransmit programming of the primary station be assessed a fee of $595 annually, based upon the $500 fee for FY 1994 passed by the House of Representatives for satellite stations. While not legally binding, the $500 base fee was determined to be appropriate for licensees of television satellite stations in our FY 1994 authorization bill passed in the House of Representatives. See H.R. 4522. In addition, we believe that this fee amount takes into account the public interest factors reflected in comments filed in the proceeding to adopt the FY 1994 Schedule of Regulatory Fees. See 447 U.S.C. § 159(b)(3). In developing the FY 1995 fee for television satellite stations, we used the $500 fee that the House enacted for FY 1994 for television satellite stations to derive a FY 1995 fee requirement of $595 per television satellite station resulting from a "simulated" FY 1994 revenue requirement divided by the estimated payment units of 101 satellite television station licenses. Therefore, we propose to exercise our authority to make permitted amendments to the fees to establish the satellite television fee at $595 per license. We expect that this fee will result in approximately $60,095 of revenues. See Appendix E. We caution that only those stations designated as satellite television stations in the 1994 edition of the Television and Cable Factbook (No. 62) are eligible to submit the fee applicable to satellite television stations. All other television licensees are subject to the regulatory fee payment required for their class of station and market.[15]

f. Construction Permits - Commercial VHF Television Stations

34. This category includes holders of permits to construct new commercial VHF television stations. For FY 1995, the cost allocation for this service category is $52,525, resulting from the fee category's FY 1994 revenue requirement under the statutory fee schedule. Payment units for VHF construction permits are estimated to be 11 permits. Dividing the revenue requirement for VHF construction permits by its estimated payment

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[15] We acknowledge that the Commission has initiated an NPRM seeking comment on whether satellite stations should continue to be exempt from the Commission's national television ownership restrictions. Be advised that the Commission's decision to assess a regulatory fee for satellite stations that is less than the amount for commercial television stations should not be taken as a signal that any determination has been made with regard to this outstanding proceeding.

units results in a fee of $4,775. See Appendix E. Therefore, for FY 1995, we are proposing to assess permittees $4,775 for each VHF construction permit held. Upon issuance of an operating license, this fee would no longer be applicable. Instead, licensees would pay a fee based upon the designated market of the station. We are proposing no change to the rules for calculating and submitting regulatory fees by VHF television station construction permittees. See FY 1994 Order, Appendix B at para. 24.

g. Construction permits - Commercial UHF Television Stations

35. This category includes holders of permits to construct new UHF television stations. For FY 1995, the cost allocation for this service category is $554,625, resulting from the mandatory increase to its statutory fee schedule. Payment units for UHF construction permits are estimated to be 145 permits. Dividing the revenue requirement for this service category by its estimated payment units results in a fee of $3,825 for each UHF construction permit held. Therefore, we are proposing a fee of $3,825 per UHF television station construction permit. See Appendix E. Upon issuance of an operating license, this fee would no longer be applicable. Instead, licensees would pay a fee based upon the designated market of the station. We are proposing no change to the rules for calculating and submitting regulatory fees by UHF television station permittees. See FY 1994 Order, Appendix B at para. 25.

h. Construction Permits - Satellite Television Stations

36. We are proposing to add a new service category to the fee schedule in recognition that the holders of construction permits for UHF and VHF television satellite stations should be charged a separate, lower fee than the fee for holders of construction permits for fully operational television stations. See above, where we propose to exercise our authority to make permitted amendments to the fee schedule relating to the fee for television satellite stations. We developed the fee for television satellite construction permits by taking the average fees for VHF and UHF television stations ($12,655) and relating it to the average fee for construction permits for VHF and UHF television stations ($4,300). Using this relationship, (.339:1) for satellite stations results in a computed fee of $200 for construction permits for television satellite stations ($595 times .339). See Appendix E. An individual regulatory fee payment is to be made for each television satellite station construction permit held.

i. Low Power Television, Translator and Booster Stations.

37. This category includes Low Power UHF/VHF Television stations operating under Part 74 of the Commissions rules with a

transmitter power output limited to 0.01kw for a UHF facility and, generally, 1kw for a VHF facility. Low Power Television (LPTV) stations may retransmit the programs and signals of a TV broadcast station, originate programming, and/or operate as a subscription service. This category also includes translators and boosters operating under Part 74 which rebroadcast the signals of full service stations on a frequency different from the parent station (translators) or on the same frequency (boosters). We propose to exercise our authority to make permitted amendments to the fee schedule to include FM translator and booster stations in this fee service because we believe these facilities were inadvertently omitted from the statutory fee schedule and we are unaware of any reason not to establish a fee for these services. The stations in this category are secondary to full service stations in terms of frequency priority. The FY 1995 cost allocation for this service category is $1,368,640, resulting from the mandatory adjustment to its FY 1994 revenue requirement under the statutory fee schedule. Payment units are estimated to be 8,554 licenses, including licenses covering FM translators. Dividing the revenue requirement for this category by its estimated payment units results in a fee of $160 per license. See Appendix E. Thus, for FY 1995, we are proposing to assess licensees of low power television stations and licensees of both FM and TV translators and boosters an annual regulatory fee of $160 for each license held. We are proposing no change to the rules for calculating and submitting regulatory fee payments by licensees in this service category. See FY 1994 Order, Appendix B at paras. 26-27.

j. Broadcast Auxiliary Stations.

38. This category includes licensees of remote pickup stations, aural broadcast auxiliary stations, television broadcast auxiliary stations, and low power auxiliary stations, authorized under Part 74 of the Commission's Rules. Auxiliary stations are generally associated with a particular television or radio broadcast station or cable television system. The FY 1995 cost allocation for this category is $1,500,000, resulting from the mandatory adjustment to its FY 1994 revenue requirement under the statutory fee schedule. Payment units are estimated to be 50,000 licenses. Dividing the category's revenue requirement by its estimated payment units results in a fee of $30 per license. See Appendix E. Thus, we are proposing that licensees of commercial auxiliary stations be assessed a $30 annual regulatory fee for FY 1995 on a per call sign basis. We are proposing no change to the rules for calculating or submitting regulatory fee payments by licensees of facilities in this service category. See FY 1994 Report, Appendix B at para. 28.

k. International HF Broadcast (Short Wave)

39. This category covers international broadcast stations

licensed under Part 73 to operate on a frequency in the 5,950 Khz to 26,100 Khz range to provide service to the general public in foreign countries. The proposed fees for International HF Broadcast are set forth in the International Service category in the FY 1995 fee schedule. For FY 1995, the cost allocation for the category is $4,560, resulting from the mandatory adjustment to its FY 1994 revenue requirement under the statutory fee schedule. Payment units are estimated to be 19 licenses. Dividing the category's revenue requirements by its estimated payment units results in a fee of $240 per license. See Appendix E. Thus, for FY 1995, we are proposing to assess an annual regulatory fee of $240 per station license. We are proposing no change to the rules for calculating and submitting fees by licensees of facilities in this service category. See FY 1994 Order, Appendix B at para. 29.

3. Cable Services

a. Cable Television Systems

40. This category includes operators of cable television systems, as that term is defined in Section 76.5 of our rules, providing or distributing programming or other services to subscribers under Part 76 of our Rules. For FY 1995, the cost allocation for cable television systems is $29,070,000, resulting from the mandatory adjustment to the category's FY 1994 revenue requirement under the statutory fee schedule. Estimated payment units are 57,000,000 subscribers. Dividing the categories cost allocation by its estimated payment units results in a fee of $.51 per subscriber. See Appendix F. Therefore, we are proposing a fee of $.51 per cable television subscriber.[16]

41. Payments for cable systems are to be made on a per subscriber by community unit basis as of December 31, 1994 as reported on each cable systems's 1994 Annual Report of Cable Systems (FCC Form 325). As in FY 1994, cable systems should determine their subscriber numbers by calculating the number of single family dwellings, the number of individual households in multiple dwelling units, e.g., apartments, condominiums, mobile home parks, etc., paying at the basic subscriber rate, the number of bulk rate customers and the number of courtesy or fee customers. In order to determine the number of bulk rate subscribers, a system should divide its bulk rate charge by the annual subscription rate for individual households. We are proposing no change in the rules for calculating or submitting

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[16] Consistent with our earlier interpretation of Congressional intent, we propose to require payment of the cable system regulatory fees on a per subscriber basis rather than per 1,000 subscribers as set forth in the statutory fee schedule. See FY 1994 Order at para. 100.

regulatory fees by cable system operators. See FY 1994 Order, Appendix B at para. 31.

b. Cable Antenna Relay Service

42. This category includes cable television relay service (CARS) stations used to transmit television and related audio signals, signals of AM and FM broadcast stations and cablecasting from the point of reception to a terminal point from where the signals are distributed to the public by a cable television system. For FY 1995, the cost allocation for CARS is $635,010, resulting from the mandatory adjustment to its FY 1994 revenue requirement based upon the statutory fee schedule. Payment units are estimated to be 2,082 licenses. Dividing the revenue requirement for CARS by its estimated payment units results in a fee of $305 per license. See Appendix F. Thus, for FY 1995, we are proposing to assess a $305 regulatory fee per CARS license. We are proposing no change to the rules for calculating and submitting regulatory fees by CARS licensees.

4. Common Carrier Services

a. Mobile Services

43. Public Mobile/Cellular Radio Services, set forth in the FY 1995 fee schedule within the wireless radio service category, include common carriers and others (e.g., cellular radio licensees) offering, under Parts 22 and 24, a wide variety of land-based or air-to-ground mobile telephone, paging or data transmission services to the public. Licensees include those using radio to provide telephone services at fixed locations, such as Basic Exchange Telecommunications Radio Services, Rural Radio and Offshore Radio. For FY 1994, we required a fee payment on a subscriber basis pursuant to the statutory requirement to charge a per subscriber fee. See 47 U.S.C. § 159(g).

44. We recognize that the statutory language permitted a licensee to submit a single per subscriber fee for an entity subscribing to its service no matter how many actual units of communication services that subscriber obtained from the licensee. Nevertheless, we believe that a more equitable payment formulation would require each licensee to submit a fee based upon the total number of telephone numbers or call signs that it provides to customers so that its fee payment would better reflect the benefit that the licensee receives from its use of frequencies of communications. Therefore, for FY 1995, we propose to exercise our authority to make permitted amendments to the fee schedule to propose that each licensee in the Public Mobile/Cellular Radio Services pay an annual regulatory fee for each mobile or cellular unit (mobile or cellular call sign or telephone number), including paging units, assigned to its customers, including resellers of its services. For FY 1995, the

service category's cost allocation is $4,420,000, resulting from the mandatory adjustment to its FY 1994 revenue requirement under the statutory fee schedule. Payment units under our proposed formulation are estimated to be 34,000,000 subscribers. Dividing the category's cost allocation by its estimated subscribers results in a regulatory fee of $.13 per payment unit. See Appendix G. Thus, we are proposing a fee of $.13 per subscriber. With the exception of extending the regulatory fee to all units provided by licensees in this service category, we are proposing no change to the rules for payment of fees by licensees in the Public Mobile/Cellular Radio Services. See FY 1994 Order, Appendix B at para. 31.[17]

b. Fixed Radio Services

45. Domestic Public Fixed Radio Service includes stations authorized under Part 21 of the Commission's Rules to use microwave frequencies for video and data distribution within the United States. This category includes licensees in the Point-to-Point Microwave Radio Service, Local Television Transmission Radio Service, Digital Electronic Message Service, Multipoint Distribution Service (MDS), and Multichannel Multipoint Distribution Service (MMDS).[18] For FY 1995, the cost allocation for the Domestic Public Fixed Radio Services is $158,000, resulting from the mandatory adjustment to its FY 1994 revenue requirement under the statutory fee schedule. Payment units are estimated to be 1,320 licenses. Dividing the Service's cost allocation by its estimated payment units results in a fee of $120 per call sign. See Appendix G. Therefore, we are proposing that Domestic Public Fixed Radio Service licensees be subject to a $120 annual regulatory fee per call sign, payable on a specified date to be announced by the Commission. We are proposing no change to the rules for calculation and submission of the fee payment by licensees in the Domestic Public Fixed Radio Services. See FY 1994 Order, Appendix B at para. 37.

46. International Public Fixed Radio Service, set forth in the FY 1995 fee schedule within the International fee category, includes common carriers authorized under Part 23 of the Commission's Rules to provide radio communications between the

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[17] As noted above, we are proposing no regulatory fee for Personal Communications Services (PCS) and Commercial Mobile Radio Services (CMRS) for FY 1995 because no facilities were authorized for PCS and CMRS by our proposed date for calculating fees, October 1, 1994.

[18] MDS and MMDS are now regulated by the Mass Media Bureau and, therefore, the regulatory fees for these services are shown within the Mass Media category in the FY 1995 fee schedule. See Appendix B.

United States and a foreign point via microwave or HF troposcatter systems, other than satellites and satellite earth stations, but not including service between the United States and Mexico and the United States and Canada using frequencies above 72 MHz. The cost allocation for the International Public Fixed Radio Service is $4,800, resulting from the mandatory adjustment to its revenue requirement under the statutory fee schedule. Payment units for the Service are estimated to be 20 call signs. Dividing the Service's revenue requirement by its estimated payment units results in a fee of $240 per call sign. See Appendix F. Thus, we are proposing that international public fixed radio service licensees be subject to a $240 annual regulatory fee per call sign, payable on a specified date to be announced by the Commission. We are proposing no change to the rules for calculating and submitting fees by licensees in the International Public Fixed Radio Services. See FY 1994 Order, Appendix B at para. 38.

c. VSATs and Equivalent C-Band Antennas/Mobile Satellite Earth Stations.

47. VSATs and Equivalent C-Band Antennas includes VSAT earth stations and equivalent C-Band earth stations and antennas and earth station systems comprised of very small aperture terminals operating in the 12 and 14 GHz bands and providing a variety of communications services to other stations in the network. VSAT systems consist of a network of technically-identical small fixed-satellite earth stations which often include a larger hub station. VSAT earth stations and C-Band equivalent earth stations are authorized pursuant to Part 25 of the Commission's Rules. Mobile Satellite Earth Stations, operating pursuant to Part 25 of the rules under blanket licenses for mobile antennas (transceivers), are smaller than one meter and provide voice or data communications, including position location information for mobile platforms such as cars, buses or trucks. The 1995 cost allocation for this category is $56,810, resulting from the category's mandatory adjustment under the FY 1994 statutory fee schedule. Payment units are estimated to be 437,000 antennas. See Appendix G. Dividing the revenue requirement by estimated payment units results in a regulatory fee for FY 1995 of $.13 per authorized antenna. Therefore, we propose to assess licensees of VSATs an annual regulatory fee of $.13 per authorized antenna for FY 1995. The proposed fee for this service is set forth in the International category in the FY 1995 fee schedule. See Appendix B. We are not proposing to change the rules for calculation and payment of the fee for VSATs, VSAT equivalents and mobile earth station antennas.

d. Fixed Satellite Earth Station Antennas

48. Transmit/Receive and Transmit Only Earth Stations. This category includes fixed-satellite transmit/receive and transmit

only earth station antennas, authorized or registered under Part 25 of the Commission's rules, operated by private and public carriers to provide telephone, television, data, and other forms of communications. The proposed fees for this fee category are set forth in the FY 1995 fee schedule in the International Service category. Included in this category are telemetry, tracking, and control (TT&C) earth stations and earth station uplinks.

49. In our FY 1994 Order, we adopted the statutory fee schedule's requirement that assessed a higher fee for fixed satellite earth stations antennas of 9 meters or more than for those less than 9 meters. This distinction resulted in the anomaly that antennas performing the same function were subjected to different fees, one several thousand percent higher than the other. To rectify this disparity, we propose to exercise our permitted authority to eliminate the differing fee levels for these earth stations. We are proposing that any earth station in this service category be charged a fee based upon size as measured in meters. This modification will eliminate the disparity in fees under the former schedule, but assure that smaller antennas will continue to be subject to a smaller fee requirement than larger antennas.

50. The FY 1995 cost allocation for transmit and transmit/receive earth stations is $3,533,500, resulting from the mandatory adjustment under the FY 1994 revenue requirement for this fee category. Payment units are estimated to be 19,100 antenna meters. Dividing the cost allocation for this category by its estimated payment units results in a fee of $185 per meter. See Appendix G. Therefore, we are proposing a regulatory fee of $185 per meter for transmit/receive and transmit only earth stations. In determining the number of meters of an earth station, all measurements should be made to the tenth of a meter.

51. Receive only earth stations. For the reasons discussed above, we propose to eliminate the disparity in the fee requirement for receive only antennas above and below 9 meters. Thus receive only earth stations will be assessed a per meter fee, regardless of whether they are above or below 9 meters in size. The FY 1995 cost allocation for receive only earth stations is $4,116,000, resulting from the mandatory adjustment to the fee category's revenue requirement under the statutory fee schedule. Payment units are estimated to be 34,300 antenna meters. Dividing the cost allocation for the category by its estimated payment units results in a fee of $120 per meter. See Appendix G. Thus, we are proposing a regulatory fee of $120 per meter for receive only earth stations. All measurements will be to the tenth of a meter.

e. Space Stations (Geosynchronous)

52. Geosynchronous space stations, set forth in the FY 1995 fee schedule within the International Service category, are domestic and international satellites positioned in orbit to remain approximately fixed relative to the earth. They are authorized under Part 25 of the Commission's rules to provide communications between satellites and earth stations on a common carrier and/or private carrier basis. The FY 1995 cost allocation for geosynchronous space stations is $4,978,750, resulting from the mandatory increase in the category's FY 1994 revenue requirement under the statutory fee schedule. Payment units are estimated to be 35 operational space stations in orbit. Dividing the revenue requirement for this category by its estimated payment units results in an fee of $142,250 per operational space station in orbit. See Appendix G. Thus, we are proposing that entities authorized to operate geosynchronous space stations in accordance with section 25.120(d) will be assessed an annual regulatory fee of $142,250 per operational station in orbit. Payment is required for any geosynchronous satellite that has been launched and tested and is authorized to provide service. We are proposing no change to the rules for calculating and submitting regulatory fee payments by licensees of geosynschronous space stations. See FY 1994 Order, Appendix B at para. 35.

f. International Bearer Circuits

53. Regulatory fees for international bearer circuits are computed "per 100 active 64 Kbps circuits or equivalent." International bearer circuits are set forth in the International Service category in the FY 1995 fee schedule. The proposed fee is to be paid by the facilities-based common carrier activating the circuit in any transmission facility for the provision of service to an end user or resale carrier. However, we propose to modify our requirements for payment of the fee for bearer circuits by private submarine cable operators to require that they pay fees for circuits sold on an indefeasible right of use (IRU) basis or leased to any customer other than an international common carrier authorized by the Commission to provide U.S. international common carrier services. Compare FY 1994 Order at 5367. The fee is based upon active 64 Kbps circuits, or equivalent circuits. Under this formulation, 64 Kbps circuits or their equivalent will be assessed a fee. Equivalent circuits include the 64 Kbps circuit equivalent of larger bit stream circuits. For example, the 64 Kbps circuit equivalent of a 2.048 Mbps circuit is 30 64 Kbps circuits. Analog circuits such as 3 and 4 KHz circuits used for international service are also included as 64 Kbps circuits. However, circuits derived from 64 Kbps circuits by the use of digital circuit multiplication systems are not equivalent 64 Kbps circuits. Such circuits are not subject to fees. Only the 64 Kbps circuit from which they have been derived will be subject to payment of a fee. The FY

1995 cost allocation is $310,000 based on an estimated volume of 62,000 active 64 Kbps circuits or equivalent. For FY 1995, we are proposing an annual regulatory fee of $5.00 for each active 64 Kbps circuit or equivalent. For analog television channels we will assess fees as follows:

Analog Television Channel Size in MHz	No. of equivalent 64 Kbps Circuits
36	630
24	288
18	240

See Appendix G. for a description of the development of the fees for international bearer circuits. See FY 1994 Order, Appendix B at para. 45.

g. Inter-exchange and Local Exchange Carriers, Competitive Access Providers, Pay Telephone Providers, and other non-mobile providers of interstate service.

54. In the FY 1994 Order, we adopted the fees and calculation methodology for Inter-Exchange Carriers (IXCs), Local Exchange Carriers (LECs) and Competitive Providers (CAPs) contained in the section 9(g)'s fee schedule. We rejected proposals to modify the fee schedule because Congress intended us to adopt that schedule in its entirety for FY 1994. Under the statutory schedule, CAPs are assessed fees based upon their number of subscribers. As a consequence, some CAPs filed very small fee payments because they serve only a few subscribers even though these subscribers are large entities with heavy communications requirements.

55. Several of the commenters in the FY 1994 proceeding urged that we extend the fee requirement to other providers of interstate communications services, including resellers, in addition to those subject to a fee requirement under the statutory fee schedule. We declined to do so. However, we stated that we would review the fee schedule to determine if other carriers should be subject to the regulatory fee requirement for FY 1995.

56. We now believe that resellers and other carriers providing interstate services subject to our jurisdiction and directly benefitting from our regulation of the interstate network should be subject to a regulatory fee payment. In particular, we are cognizant that our decisions requiring facilities based carriers to eliminate any restrictions on the resale and sharing of their interstate private line communications services and facilities and our continuing market surveillance has fostered the growth of a strong communications resale industry. In opening up the interstate network to resellers, we asserted our jurisdiction over their activities pursuant to Title II of the Communications

Act.[19] We believe that carriers subject to our regulation should bear the costs of that regulation. For these reasons, we are proposing, as described below, to subject any carrier, whether facilities based or reseller, using the interstate network to a regulatory fee payment.

57. We propose to expand the schedule of fees for carriers to include not only IXCs, LECs and CAPs, but also domestic and international carriers that provide operator services, WATS, 800, 900, telex, telegraph, video, other switched, interstate access, special access, and alternative access services either by using their own facilities or by reselling facilities and services of other carriers or telephone carrier holding companies, and companies other than traditional local telephone companies that provide interstate access services to long distance carriers and other customers.[20]

58. The FY 1995 cost allocation for this category is $39,000,000, resulting from the mandatory adjustment of the Commission's FY 1994 revenue requirement under the statutory fee schedule. See Appendix G. Because our proposal and a proposed alternative method of calculating fees for the carrier category, represent a significant modification of the method in which regulatory fees are calculated, interested parties are requested to file comments concerning the most efficient and equitable method for assessment of regulatory fees.

59. We propose to calculate carrier fees based on the number of customer units, i.e., the number of users of a service, provided by a carrier as of December 31, 1994. For access service provided by local exchange carriers, the number of customer units would equal the number of presubscribed lines as described in

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[19] See Resale and Shared Use of Common Carrier Services, 60 FCC Rcd 2d 588, 600 (1977)(In addition to allowing resellers to obtain lines from facilities based carriers, we declared that "'[resale carriers],' whether they be brokers or value added carriers ... , are equally subject to the requirements of Title II of the Communications Act."); see also American Tel & Tel. Co. v. F.C.C., 978 F.2d 727, 735 (D.C. 1992)(finding that resellers and other nondominant carriers must file tariffs and offer their services pursuant to just, reasonable and nondiscriminatory rates and practices pursuant to sections 201 and 202 of the Act.) Resellers currently are subject to filing fees pursuant to section 8 of the Act.

[20] A holding company may combine fee payments of its operating companies and pay their combined fees for a particular service in a single combined payment or by installments, if the aggregate of their fees in a single service qualifies the holding company to make installment payments.

Section 69.116 of the Commission's Rules. For pay telephone service, the number of customer units would equal the number of pay telephones used as the basis for pay telephone compensation. For MTS provided by pre-selected interexchange carriers, the number of customer units would equal the number of presubscribed lines as described in Section 69.116 of the Commissions Rules. For other switched services, such as MTS, WATS, 800, 900 and operator service not billed to the number from which the call is placed, the number of customer units would equal the number of billing accounts less those accounts already associated with presubscribed lines reported by the carrier. For non-switched services, including service provided by CAPs, special access, and private (alternative access) line providers, the number of customer units would be based on the total capacity provided to customers measured as voice equivalent lines. For this purpose, 4 Khz or 64 Kbps equivalents would equate to one voice equivalent line. Dividing the $39,000,000 cost allocation by an estimated 300,000,000 customer units[21] results in a fee of $.13 per customer unit.

60. In addition, as an alternative to the fee structure described above, we are proposing to base our carrier fees on the number of minutes of interstate service in calendar year 1994. For access service provided by local exchange carriers, the number of interstate minutes would equal the number of originating and terminating access minutes. For interstate service upon which access charges are paid, the number of minutes would equal the number of originating and terminating access minutes. For other interstate services billed based on timed usage, the number of minutes would equal the number of billed minutes. For interstate services not billed on the basis of timed usage, minutes would be estimated as the billed revenue in dollars times 10. This represents a cross-over assumption that customers would substitute ordinary MTS for any service which cost more than ten cents per minute. Hence, revenue in dollars times 10 represents a lower bound number of minutes. Dividing the $39,000,000 cost allocation by 508 billion minutes[22]

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[21] Local exchange carriers and toll carriers will each report a total of 142 million presubscribed lines. Allowing for 1/2 million privately owned pay telephone lines, 4 million special access lines, and approximately 5% resale and competitive access provision, it appears that carriers would report approximately 300 million customer units.

[22] There will be approximately 393 billion common carrier line access minutes in 1994 based on minutes reported for the first half of the year times 2. Adding 5% for resale results in 413 billion minutes. Based on 1992 published TRS Fund data, carriers provided nine and one half billion dollars of non-switched interstate service, which adds 95 million minutes to the

results in a fee of $.08 per 1000 minutes.

D. Procedures for Payment of Regulatory Fees

61. Generally, we propose to retain the procedures that we established in our FY 94 Report and Order for the payment of regulatory fees. Section 9(f) requires that we permit "payment by installments in the case of fees in large amounts, and in the case of small amounts, shall require the payment of the fee in advance for a number of years not to exceed the term of the license held by the payor." See 47 U.S.C. § 1559(f). Consistent with the section, we are again proposing three categories of fee payments, based upon the category of service for which the fee payment is due and the amount of the fee to be paid. The fee categories are 1) "standard" fees, 2) "large" fees, and 3) "small" fees.

1. Annual Payments of Standard Fees

62. Standard fees are those regulatory fees that are payable in full on an annual basis. Payers of standard fees are not required to make advance payments for their full license term and are not eligible for installment payments. All standard fees are payable in full on the date we establish for payment of fees in their regulatory fee category. The payment dates for each regulatory fee category will be announced either in the Report and Order in this proceeding or by public notice in the Federal Register following the termination of the proceeding.

2. Installment Payments for Large Fees

63. In our FY 1994 Order, we classified fees for several services at certain payment amounts and above as "large" fees, eligible to be paid by installment payments, and afforded eligible payers the opportunity to submit fees for these services in two equally divided payments.[23] We indicated, however, that based on our experience with the fee program, we would consider increasing eligibility to make installments payments. After gaining some experience, we are proposing to now lower eligibility for installment payments. Our decision to lower the eligibility threshold results from a determination that our payment processing system feasibly can handle a reasonable increase in the number of regulatees who pay in installments. Therefore, we propose to set the eligibility requirement at the lowest installment payment level permitted in FY 1994, $12,000, and propose that regulatees in any category of service with a

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total.

[23]See FY 1994 Order at paragraphs 39 through 45.

payment liability of $12,000 or more be eligible to make installment payments. Eligibility for payment by installment will be based upon the amount of either a single regulatory fee payment or a combination of fee payments by the same licensee or regulatee.

64. In our FY 1994 Order, we permitted payment of "large" fees in two installments and stated that for future years we would permit four installment payments by eligible regulatees. The limited time that will be available following completion of this proceeding and the required 90 day notification period to Congress of our amendments to the Schedule of Regulatory Fees following completion of this proceeding makes the use of four installment payments impractical for installment payers and unduly burdens our fee collection process. Therefore, we propose that regulatees eligible to pay by installment payments may submit their required fee in two equal payments (on dates to be announced in the Report and Order terminating this proceeding or in the Federal Register following the proceeding's termination), or, in the alternative, may submit a single full payment on the date that their final installment payment is due.

3. Advance Payments of Small Fees

65. We are proposing to treat regulatory fee payments by certain radio licensees as small fees subject to advance payments. Advance payments will be required from licensees of those services that we decided would be subject to advance payments in our FY 1994 Order.[24] Payers of advance fees will submit the entire fee due for the full term of their licenses when filing their initial, reinstatement or renewal application. Those subject to the fee payment pay the amount due for the current fiscal year multiplied by the number of years in the term of their requested license. In the event that the required fee is adjusted following their payment of the fee, the payor would not be subject to the payment of a new fee until filing an application for renewal or reinstatement of the license. Thus, payment for the full license term would be made based upon the regulatory fee applicable at the time the application is filed. Refunds will not be made in cases where the fee for a service is lower for FY 1995 than the fee paid under the FY 1994 fee

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[24] Applicants for new, renewal and reinstatement licenses in the following services will be required to pay their regulatory fees in advance: Land Mobile Services, Microwave services, Interactive Video Data Services (IVDS), Marine (Ship) Service, Marine (Coast) Service, Private Land Mobile (Other) Services, Aviation (Aircraft) Service, Aviation (Ground) Service, General Mobile Radio Service (GMRS). In addition, applicants for amateur radio vanity call signs will be required to submit an advance payment.

schedule. The Commission will announce by public notice in the Federal Register the effective date for the payment of small fees pursuant to the FY 1995 fee schedule.

4. Timing of Standard Fee Calculations and Payment Dates.

66. As noted, the date for payment of standard fees and installment payments will be published in the Federal Register. For licensees, permittees and holders of other authorizations in the Common Carrier, Mass Media, and Cable Services, whose fees are not based on a subscriber, line or circuit count, fees should be submitted for any authorization held as of October 1, 1994. As in our FY 1994 Order, we are proposing October 1 as the date to be used for calculating standard fees since it is the first day of the fiscal year and, therefore, current licensees subject to the fees would have benefited from our regulatory activities from the beginning of the period covered by the payment.

67. In the case of regulatees whose fees are based upon a subscriber, line or circuit count, we propose that the number of a regulatees' subscribers, licenses or circuits on December 31, 1994, will be used to calculate the fee payment. We have selected the last date of the calendar year because many of these entities file reports with us as of that date. Others calculate their subscriber numbers as of that date for internal purposes. Therefore, calculation of the regulatory fee as of that date will facilitate both an entity's computation of its fee payment and our verification that the correct fee payment has been submitted.[25]

IV. Procedural Matters

A. Comment Period and Procedures

68. Pursuant to the procedures set forth in sections 1.415 and 1.419 of the Commission's rules, interested parties may file comments on or before February 13, 1995 and reply comments on or before February 28, 1995. All relevant comments will be considered by the Commission before final action is taken in this proceeding. To file formally in this proceeding, participants must file an original and four copies of all comments, reply comments and supporting materials. If participants want each Commissioner to receive a personal copy of their comments, an

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[25] Cable systems should calculate their FY 1995 regulatory fees using the subscriber data to be submitted to the Commission in their 1994 Annual Report of Cable Television Systems (FCC Form 325). Accordingly, their number of subscribers will not necessarily be based on December 31, 1994, but rather on "a typical day in the last full week" of December 1994. (See FCC Form 325 Instructions.)

original and nine copies must be filed. Comments and reply comments should be sent to the Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Interested parties, who do not wish to formally participate in this proceeding, may file informal comments to the same address. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center (Room 239) of the Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20054.

B. Ex Parte Rules

69. This is a non-restricted notice and comment rulemaking proceeding. Ex parte presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed pursuant to the Commission's rules. See 47 C.F.R. §§ 1.1202, 1.1203 and 1026(a).

C. Initial Regulatory Flexibility Analysis

70. As required by section 603 of the Regulatory Flexibility Act (Pub. L. No. 96-354, 94 Stat. 1165, 5 U.S.C. § 601 et seq. (1981), the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) of the expected impact on small entities of the proposals suggested in this document. The IRFA is set forth in Appendix A. Written public comments are requested with respect to the IRFA. These comments must be filed in accordance with the same filing deadlines for comments on the rest of the Notice, but they must have a separate and distinct heading, designating the comments as responses to the IRFA. The secretary shall send a copy of this Notice , including the IRFA, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with section 603(a) of the Regulatory Flexibility Act.

D. Authority and Further Information

71. Authority for this proceeding is contained in sections 4(i) and (j, 9, and 303(r) of the Communications Act of 1934 as amended, 47 U.S.C. §§ 154(1) and (j) and 159 and 303(r).

72. Further information about this proceeding may be obtained by contacting Peter W. Herrick, Acting Associate Managing Director, Program Analysis at (202) 418-0443.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

APPENDIX A

Initial Regulatory Flexibility Analysis.

Reason for Action

This rulemaking proceeding is initiated to obtain comment regarding the Commission's proposed amendment of its Schedule of Regulatory Fees in order to revise its regulatory fees to collect $116,400,000, the amount that Congress has required the Commission to recover through regulatory fees in Fiscal Year 1995.

Objectives

The Commission seeks to collect the necessary amount through its proposed revised regulatory fees, as contained in the attached Schedule of Regulatory Fees, in the most efficient manner possible and without undue burden to the public.

Legal Basis

The proposed action is authorized under sections (4)(i) and (j), 9 and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and (j), 159, and 303(r).

Reporting, Recordkeeping and other Compliance Requirements

The Commission has developed FCC Form 159 and FCC Form 159C for submission with regulatory fee payments. Also, the Commission has adopted implementation rules governing the payment of regulatory fees. See 47 C.R.R. § 1.1151 et seq.

Federal Rules that Overlap, Duplicate or Conflict with Proposed Rule

None.

Description, Potential Impact, and Number of Small Entities Involved

The proposed amendment of the Schedule of Regulatory Fees will affect permittees, licensees and other regulatees in the cable, common carrier, mass media, private radio and international services. After evaluating the comments in this proceeding, the Commission will further examine the impact of any fee revisions or additions or rule changes on small entities and set forth our findings in the Final Regulatory Flexibility Analysis.

Any Significant Alternatives Minimizing the Impact on Small Entities Consistent with the Stated Objectives

The Notice solicits comments on alternative methods of assessing the regulatory fees necessary to recover the $116,400,000 in costs that Congress has required us to recover through regulatory fees in FY 1995.

SCHEDULE OF REGULATORY FEES

Fee Category	Annual Regulatory Fee
WIRELESS RADIO	
Land Mobile (per license) (220-222 Mhz, above 470 Mhz, Base Station and SMRS) (47 CFR Part 90)	7
Microwave (per license) (47 CFR Part 94)	7
Interactive Video Data Service (per license) (47 CFR Part 95)	7
Marine (Ship) (per station) (47 CFR Part 80	3
Marine (Coast) (per license) (47 CFR Part 87)	3
General Mobile Radio Service (per license) (47 CFR Part 95)	3
Land Mobile (per license) (all stations not covered above)	3
Aviation (Aircraft) (per station) (47 CFR Part 87)	3
Aviation (Ground) (per license) (47 CFR Part 87)	3
Amateur Vanity Call Signs	3
Cellular/Public Mobile Radio (per subscriber) (47 CFR Part 22)	.13
MASS MEDIA	
AM Radio (47 CFR Part 73)	
Class A (Arbitron Market)	1,525
Class A (Non-Arbitron Market)	565
Class B (Arbitron Market)	850

Fee Category Mass Media (continued)	Annual Regulatory Fee
Class B (Non-Arbitron Market)	315
Class C (Arbitron Market)	340
Class C (Non-Arbitron Market)	125
Class D (Arbitron Market)	425
Class D (Non-Arbitron Market)	155
Construction Permits	120
FM Radio (47 CFR Part 73)	
Classes C, C1, C2, B (Arbitron Market)	1,525
Classes C, C1, C2, B (Non-Arbitron Market)	565
Classes A, B1, C3 (Arbitron Market)	1,025
Classes A, B1, C3 (Non-Arbitron Market)	375
Construction Permits	595
TV (47 CFR Part 73) VHF Commercial	
Markets 1-10	21,450
Markets 11-25	19,075
Markets 26-50	14,300
Markets 51-100	9,525
Remaining Markets	5,950
Construction Permits	4,775
TV (47 CFR Part 73) UHF Commercial	
Markets 1-10	17,150
Markets 11-25	15,250
Markets 26-50	11,450
Markets 51-100	7,625
Remaining Markets	4,775
Construction Permits	3,825
Terrestrial Satellite Television Stations (All Markets)	595

Fee Category Mass Media (continued)	Annual Regulatory Fee
Construction Permits - Tererrestial Satellite Television Stations	200
Low Power TV, TV/FM Translators & Boosters (47 CFR Part 74)	160
Broadcast Auxiliary (47 CFR Part 74)	30
Multipoint Distribution Service (per call sign) (47 CFR Part 21)	120
CABLE TELEVISION	
Cable Antenna Relay Service (47 CFR Part 78)	305
Cable Television Systems (per subscriber) (47 CFR Part 76)	.51
COMMON CARRIER	
Inter-Exchange Carrier (per customer unit)	.13
Local Exchange Carrier (per customer unit)	.13
Competitive Access Provider (per customer unit)	.13
Operator Service Provider/Pay Telephone Operators (per customer unit)	.13
Resellers (per customer unit)	.13
Other Interstate Providers (per customer unit)	.13
Domestic Public Fixed (per call sign) (CFR Part 21)	120
INTERNATIONAL	
Earth Stations (47 CFR Part 25)	
VSAT/Equivalent C-Band antennas/Mobile Satellite Earth Stations (per antenna)	.13
Earth Station Antennas - Transmit/Receive and Transmit Only (per meter)	185
Earth Station Antennas - Receive Only (per meter)	120
Space Station (per operational station in geosynchronous orbit) (47 CFR Part 25)	142,250
International Circuits (per active 64KB circuit	5
International Public Fixed (per call sign) (CFR Part 23)	240
International (HF) Broadcast (CFR Part 73)	240

HOW FULL TIME EQUIVALENTS (FTEs) WERE CALCULATED

(1) FTE allocations represent how the Commission anticipates FTEs will actually be spent during the course of the fiscal year.[26] Many factors influence how FTEs are actually employed during the year, including varying rates of attrition, speed of hiring new and replacement staff, the use of part time or temporary employees in lieu of permanent staff, changing Commission priorities, and reorganizations and other activities requiring a reallocation or reassignment of staff. The FTE allocations used in the fee development process have been updated to reflect a number of personnel reassignments made incident to recent reorganizations within the Commission. The impact on the fee development process is negligible since the reorganizations, although resulting in a reassignment of staff and functions, have not significantly changed the type of work the reassigned staff is performing.[27]

(2) Only the Commission's enforcement, policy and rulemaking, international, and user information activities are covered by the regulatory fee program.[28] Of the Commission's total of 2,271 FTEs, 846 FTEs are directly assigned to the agency's primary operating bureaus to perform enforcement, policy and rulemaking, international, and user information activities. An additional 560 FTEs have been identified by the agency as supporting these feeable activities.[29] The results of our FTE allocations are as follows:

Fee Category	FTEs
Mass Media	253
Common Carrier	689
Private Radio	103
Cable Services	361
Total	1406

(3) The total of the costs to be offset by regulatory fees in FY 1995 is $116,400,000. Each fee category was allocated its share of costs based upon the ratio of its FTEs to the total number of FTEs allocated to all regulatory fee categories. The results of this allocation of costs are shown below:

Fee Category	FTEs	%	Cost Allocation (in millions)
Mass Media	253	18.0	$20.9
Common Carrier	689	49.0	57.0
Private Radio	103	7.3	8.5
Cable Services	361	25.7	29.9
Total	1406	100.0	$116.4[30]

[26] It should be noted that FTE allocations are year-end estimates and thus represent projected work time of on-board staff as well as new and replacement staff yet to be hired.

[27] The Commission has chosen to retain, for fee determination purposes, the fee classifications (i.e., Private Radio, Common Carrier, Cable Services and Mass Media) contained in 47 U.S.C. Section 159. Although we believe that we have authority to change the classifications to align them more closely with our current organizational structure, we wanted to minimize any adverse impacts to the schedule brought about solely by such a classification change.

[28] The regulatory fee program encompasses a total of 1,406 FTEs. The agency's Authorization of Service, Legal Services and Executive Direction Activities cover an additional 865 FTEs. Authorization of Service regulatory costs are recovered pursuant to Section 8 of the Communications Act.

[29] These support activities include a proportionate share of field operations, engineering and technology and certain general program support staff FTEs.

[30] May not add due to rounding.

DEVELOPMENT OF PRIVATE RADIO SERVICES REGULATORY FEES

Activity Cost Allocation: The Private Radio Activity was allocated 7.3% (103 FTEs) of the total 1,406 FTEs associated with all regulatory fee activities. The same percentage (7.3%) was applied to total regulatory fee activity costs ($116.4 million times 7.3% = $8.5 million).

Revision of Payee Unit Volumes: Payee volume estimates (units of payment) were updated for FY 1995. See Table #1 below.

Projected Revenue Using FY 1994 Fee Amounts & Revised FY 1995 Payee Units: Projected revenue for FY 1995 for Private Radio Activities using FY 1994 fee amounts was calculated by multiplying the updated payee volume in each fee category times the FY 1994 fee amounts. The resulting total revenue in these categories totaled approximately $19.8 million.

Pro-Rata Application of FY 1995 Revenue Requirement: Because projected revenues using FY 1994 fee amounts would have resulted in excess collections of $11.3 million ($19.8 million minus $8.5 million), proposed Private Radio fees for FY 1995 needed to be multiplied by 43% ($8.5 million divided by $19.8 million = 43%) so that revenue would better approximate the $8.5 million cost allocation for this Activity. Table #1 below shows cost allocations that were computed for each fee category within the Private Radio Activity:

Calculation of Fee: We then divided each of the above cost allocations by the applicable license term and then divided that result by the FY 1995 projected payee volume to determine the new fee requirement for each fee category within the Private Radio Activity:

Category	Cost Allocation	Divided By License Term (Yrs)	Divided By Payee Volume	Equals New Fee[31]
Land Mobile (220-222 MHz, 470 MHz and above, unless otherwise noted)	$462,455	5	13,213	7
Microwave	225,400	5	6,440	7
IVDS	50,750	5	1,450	7
Marine (Ship)	5,070,420	10	169,014	3
GMRS	41,775	5	2,785	3
Land Mobile (Other)	1,396,275	5	93,085	3
Aviation (Aircraft)	1,130,430	10	37,681	3
Marine (Coast)	41,955	5	2,797	3
Aviation (Ground)	39,900	5	2,660	3
Amateur Vanity Call Signs	60,000	10	2,000	3
Total	$8,527,169			

Table #1

[31] Rounded (applies to all tables).

DEVELOPMENT OF MASS MEDIA SERVICES REGULATORY FEES

Activity Cost Allocation: The Mass Media Activity was allocated 18.0% (253 FTEs) of the total 1,406 FTEs associated with all regulatory fee activities. The same percentage (18.0%) was applied to total regulatory fee activity costs ($116.4 million times 18.0% = $20.9 million).

Revision of Payee Unit Volumes: Payee volume estimates (units of payment) were updated for FY 1995. See Table #2 below.

Projected Revenue Using FY 1994 Fee Amounts & Revised FY 1995 Payee Units: Projected revenue for FY 1995 for Mass Media Activities using FY 1994 fee amounts was calculated by multiplying the updated payee volume in each fee category times the FY 1994 fee amounts. The resulting total revenue in these categories totaled approximately $17.6 million.

Pro-Rata Application of FY 1995 Revenue Requirement: Because projected revenues using FY 1994 fee amounts would have resulted in collections $3.3 million less than required ($20.9 million minus $17.6 million), proposed Mass Media fees for FY 1995 needed to be adjusted upward by 119.2% ($20.9 million divided by $17.6 million = 119.2%) so that revenue would better approximate the $20.9 million cost allocation for this Activity. Table #2 below shows cost allocations that were computed for each fee category within the Mass Media Activity.

Calculation of Fee: We then divided each of the above cost allocations by the FY 1995 projected payee volume to determine the new fee requirement for each fee category within the Mass Media Activity.

Revision to AM/FM Radio Fees: In the legislated FY 1994 fee schedule, AM & FM radio stations are distinguished by operational class (Class A, B, etc.). In order to provide a greater degree of progressivity for AM/FM fees, we added a simple market structure that further distinguishes small stations from large stations of the same operational class. In effect, we created two fees for each class or group of stations by distinguishing the fees to be paid by stations located in Arbitron ranked markets and those in remaining non-Arbitron markets. To calculate the new fees we first totalled the revenues required to be collected for each fee category contained in the FY 1994 schedule:

AM (Class A)	$82,775	FM(Class C,C1,C2,B)	$2,779,950
AM (Class B)	1,026,600	FM (Class A,B1,C3)	1,996,800
AM (Class C)	247,920	Total	$4,875,550
AM (Class D)	636,000		
Total	$1,993,295		

We determined that the most logical distinction between these kinds of stations is whether or not they are located in Arbitron ranked markets. Next, we quantified this market-based distinction by adopting a differentiation in fees similar to that between "remaining market" fees and larger market fees for television stations. We computed this relationship as follows:

(Markets 1-10 fee)+(Markets 11-25 fee)+(Markets 26-50 fee)+(Markets 51-100 fee) divided by 4 = Average Market fee. (Average Market fee) divided by (Remaining Markets fee) = Ratio

The resulting ratio for both VHF and UHF television stations is 2.7, meaning that stations in higher ranked markets, on average, pay 2.7 times what stations in remaining markets pay. For example, the computation for VHF television stations is:

($18,000 + $16,000 + $12,000 + $8,000)/4 = $13,500 ($13,500)/($5,000) = 2.7

We recognize that other ratios would also provide some degree of differentiation between large and small stations, but chose the 2.7:1 ratio in the belief that it best provides a meaningful separation between the two types of stations and keeps the calculation of individual fees relatively simple.

We also believe it would best serve the public interest to retain the relative relationships between each AM and FM fee classification contained in the legislated fee schedule utilized in FY 1994. For example, in FY 1994 a Class B AM station fee of $500 was exactly twice that of a Class D AM station ($250). We therefore retained the same relative values between the station classes for those fees associated with remaining markets.[32] As noted above, the fees for ranked markets were established at an amount equaling 2.7 times that of stations in remaining markets within each station class.

Since our overall methodology for calculating FY 1995 fees identified the costs which have to be recovered in each major fee category, including the AM and FM radio categories, we next performed a series of simple mathematical calculations to determine each of the individual AM and FM fees. The results of our computations

[32] The relationship between fees assessed to the various classes of station follow the same relationship as the 1994 fees. For example, AM Class A stations were assessed $900 which was 4.5 times the $200 fee for AM Class C stations. The FM Class C, C1, C2 & B fee of $900 was 1.5 times the $600 fee for FM Class A, B1 & C3) stations.

are as follows:[33]

AM Class A/Arbitron Markets	$1,525
AM Class A/Non-Arbitron Markets	565
AM Class B/Arbitron Markets	$ 850
AM Class B/Non-Arbitron Markets	315
AM Class C/Arbitron Markets	$ 340
AM Class C/Non-Arbitron Markets	125
AM Class D/Arbitron Markets	$ 425
AM Class D/Non-Arbitron Markets	155
FM Classes (C, C1, C2 and B)/Arbitron Markets	$1,525
FM Classes (C, C1, C2 and B)/Non-Arbitron Markets	565
FM Classes (A, B1 and C3)/Arbitron Markets	$1,025
FM Classes (A, B1 and C3)/Non-Arbitron Markets	375

Category	Cost Allocation	Divided By Payee Volume	Equals New Fee[34]
AM Radio (Class A)	$82,775	77	1,075
AM Radio (Class B)	1,026,600	1,711	600
AM Radio (Class C)	247,920	1,033	240
AM Radio (Class D)	636,000	2,120	300
AM Radio (Construction Permit)	9,480	79	120

[33] Individual fee amounts were computed by applying the ratios cited in Footnote #1 to the number of stations in each service category, and determining the base (lowest) fee given the amount of revenue allocated to the Mass Media services to be collected. Once we determined the base fee we then used the ratio between fees for different classes of service to determine the fees for each class. For example, we computed the FM fees as follows:

The 1994 fee for Class C, C1, C2 & B stations is $900 and is 1.5 times the $600 fee for Class A, B1, & C3 stations. This ratio was then applied to the non-Arbitron markets. Thus, the fees for the C, C1, C2 and B stations in non-Arbitron markets is also 1.5 times the fees for Class A, B1 and C3 stations in non-Arbitron markets. We then determined that there is a 2.7 to 1 ratio between the fee for television stations in the top 100 markets and in the remaining markets for FY 1994. We applied this 2.7 ratio to the fees for FM stations in Arbitron ranked markets and the fees for the same classes of stations in non-Arbitron markets. Thus, if the algebraic expression of x is the value of non-Arbitron market A, B1 and C3 stations, 2.7x is the value of Arbitron market A,B1 and C3 stations, and 2.7 (1.5x) or 4.05x is the value of Arbitron ranked C, C1, C2 and B stations. The estimated payee volume for C, C1, C2 and B stations is 2,481, of which 1,629 are located in Arbitron ranked markets and 852 are located in non-Arbitron markets. Likewise, the estimated payee volume for A, B1 and C3 stations is 2,586 of which 934 are located in Arbitron markets and 1,652 are located in non-Arbitron markets.

Algebraically, the fees are computed as follows:

$1,652x + (2.7x)(934) + (1.5x)(852) + (4.05x)(1,629) = \$4,553,865$

$x = \$377$

The calculated fees are rounded to the nearest $25 if over $1,000 and the nearest $5 if under $1,000. Thus, the FM fees are:

Class A, B1, C3 in non-Arbitron markets = $375
Class A, B1, C3 in Arbitron ranked markets = $1,025
Class C, C1, C2 and B in non-Arbitron markets = $565
Class C, C1, C2 and B in Arbitron ranked markets = $1,525

[34] Represents fee amounts resulting from application of mandatory adjustments. The cost allocations for AM and FM fee categories were subsequently totaled and used to calculate more progressive AM and FM fees incorporating a market structure basis. These calculations are shown in Footnote #2.

Category	Cost Allocation	Divided By Payer Volume	Equals New Fee
FM Radio (Classes C,C1,C2,B)	2,779,950	2,481	1,120
FM Radio (Classes A,B1,C3)	1,773,915	2,586	685
FM Radio (Construction Permit)	418,285	703	595
VHF TV (Mkt 1-10)	922,237	43	21,450
VHF TV (Mkt 11-25)	1,086,667	57	19,075
VHF TV (Mkt 26-50)	1,115,264	78	14,300
VHF TV (Mkt 51-100)	962,749	101	9,525
VHF TV (Remaining Mkts)	1,000,878	168	5,950
VHF TV (Construction Permit)	52,427	11	4,775
UHF TV (Mkt 1-10)	1,475,580	86	17,150
UHF TV (Mkt 11-25)	1,113,357	73	15,250
UHF TV (Mkt 26-50)	1,040,913	91	11,450
UHF TV (Mkt 51-100)	1,037,100	136	8,325
UHF TV (Remaining Mkts)	700,614	147	5,200
UHF TV (Construction Permit)	552,866	145	4,150
Auxiliaries	1,489,401	50,000	30
LPTV/Translators/ Boosters	1,375,956	8,554	160
Int'l Short Wave	4,528	19	240
TV Satellite (Any Mkt)[35]	60,172	101	595
TV Satellite (Construction Permit)[36]			200
Multipoint Distribution Service[37]			120
Total	$20,960,285		

Table #2

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[35] The FY 1994 legislated fee schedule did not distinguish between full service television stations and satellite television stations. Although final legislation has not yet been passed by the Congress to assess satellite stations a reduced fee, the House of Representatives did pass legislation establishing a $500 fee for satellite stations in FY 1994. While not legally binding, we used the $500 House passed fee as a "simulated" FY 1994 fee in order to calculate a FY 1995 fee for satellite stations.

[36] Unlike other fees proposed for FY 1995, the TV satellite station construction permit fee of $220 was determined by taking the average fee for UHF & VHF television stations ($12,655) and relating it to the average UHF/VHF construction permit fee ($4,300). Using the same relationship (.340 to 1) for satellite television stations results in a computed fee of $200 (rounded) for satellite television station construction permits ($595 times .340).

[37] The fee for single-channel and multi-channel Multipoint Distribution Service (MDS & MMDS) was developed as part of the Domestic Public Fixed Radio Service, a common carrier service. Regulation of the MDS and MMDS services was subsequently transferred to the Mass Media Bureau.

Appendix F

DEVELOPMENT OF CABLE SERVICES REGULATORY FEES

Activity Cost Allocation: The Cable Services Activity was allocated 25.7% (361 FTEs) of the total 1,406 FTEs associated with all regulatory fee activities. The same percentage (25.7%) was applied to total regulatory fee activity costs ($116.4 million times 25.7% = $29.9 million).

Revision of Payee Unit Volumes: Payee volume estimates (units of payment) were updated for FY 1995. See Table #3 below.

Projected Revenue Using FY 1994 Fee Amounts & Revised FY 1995 Payee Units: Projected revenue for FY 1995 for Cable Services Activities using FY 1994 fee amounts was calculated by multiplying the updated payee volume in each fee category times the FY 1994 fee amounts. The resulting total revenue in these categories totaled approximately $21.5 million.

Pro-Rata Application of FY 1995 Revenue Requirement: Because projected revenues using FY 1994 fee amounts would have resulted in collections $8.4 million less than required ($21.5 million minus $29.9 million), proposed Cable Services fees for FY 1995 needed to be adjusted upward by 139% ($29.9 million divided by $21.5 million = 139%) so that revenue would better approximate the $29.9 million cost allocation for this Activity. Table #3 below shows cost allocations that were computed for each fee category within the Cable Services Activity.

Calculation of Fee: We then divided each of the above cost allocations by the FY 1995 projected payee volume to determine the new fee requirement for each fee category within the Cable Services Activity.

Category	Cost Allocation	Divided By Payee Volume	Equals New Fee
CARS	$635,288	2,082	305
Cable Television Systems	29,251,199	57,000,000	.51
Total	$29,824,911		

Table #3

DEVELOPMENT OF COMMON CARRIER SERVICES REGULATORY FEES

Activity Cost Allocation: The Common Carrier Activity was allocated 49.0% (689 FTEs) of the total 1,406 FTEs associated with all regulatory fee activities. The same percentage (49.0%) was applied to total regulatory fee activity costs ($116.4 million times 49.0% = $57.0 million).

Revision of Payee Unit Volumes: Payee volume estimates (units of payment) were updated for FY 1995. See Table #2 below.

Projected Revenue Using FY 1994 Fee Amounts & Revised FY 1995 Payee Units: Projected revenue for FY 1995 for Common Carrier Activities using FY 1994 fee amounts was calculated by multiplying the updated payee volume in each fee category times the FY 1994 fee amounts. The resulting total revenue in these categories totaled approximately $26.1 million.

Pro-Rata Application of FY 1995 Revenue Requirement: Because projected revenues using FY 1994 fee amounts would have resulted in collections $30.9 million less than required ($57.0 million minus $26.1 million), proposed Common Carrier fees for FY 1995 needed to be adjusted upward by 218.9% ($26.1 million divided by $30.9 million = 218.9%) so that revenue would better approximate the $57.0 million cost allocation for this Activity. Table #4 below shows cost allocations that were computed for each fee category within the Common Carrier Activity.

Calculation of Fee: We then divided each of the above cost allocations by the FY 1995 projected payee volume to determine the new fee requirement for each fee category within the Common Carrier Activity:

Category	Cost Allocation	Divided By Payee Volume	Equals New Fee
Domestic Public Fixed Radio	$158,894	1,320	120
Cellular/Public Mobile Radio	4,464,803	34,000,000	.13
International Public Fixed Radio	4,815	20	240
VSATs/Mobile Earth Stations	57,386	437,000	.13
Earth station Antennas (Tr & T/R)	3,553,239	19,100	185
Earth Station Antennas (Receive)	4,128,849	34,300	120
Space Stations	4,979,131	35	142,250
IXC,LEC,CAPS,Other Providers	39,395,321	300,000,000	.13
International Circuits	298,529	62,000	5
Total	$57,081,566		

Table #4